CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

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and

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 2, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO COUNTRY OF ORIGIN OF CERTAIN GIRLS' KNITTED DRESSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to the country of origin of certain girls' knitted dresses.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter relating to the country of origin of certain girls' knitted dresses. Similarly, Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation and modification was published on November 28, 2001, in Vol. 35, No. 48, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This modification and revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Shari Suzuki, Textile Branch, (202) 927–2339.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on November 28, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 48, proposing to modify New York Ruling Letter (NY) G82930, dated November 8, 2000. No comments were received in response to the notice of proposed action.

As stated in the proposed notice, this modification will cover any rulings on the subject merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of

lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY G82930, dated November 8, 2000, and any other rulings not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper country of origin of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter HQ 964794 as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions that is contrary to the position set forth in this notice.

In accordance with 19 U.S.C. 1625 (c) this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: December 28, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 28, 2001.

CLA–2 RR:CR:TE 964794 SS
Category: Classification
Tariff No. 6104.42.0020

MR. EDWARD HENG
GROUP LOGISTICS MANAGER
GHIM LI FASHION CO. PTE. LTD.
No. 7 Kampong Kaya Road
Singapore 438162

Re: Modification of NY G82930; Classification and country of origin determination for two girls' knit cotton dresses; 19 CFR 102.21(c)(4).

DEAR MR. HENG:

On November 8, 2000, the New York Office of the Customs Service issued New York Ruling Letter (NY) G82930 to you regarding the classification and country of origin determination for two girls' knit cotton dresses. This letter is to inform you that upon review of NY G82930, it has been determined that the ruling should be modified to the extent that it addresses the country of origin determination. This ruling does not modify or revoke the classification of the dresses. This letter sets forth the correct country of origin determination.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on November 28, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 48, proposing to modify NY G82930 and to revoke the treatment pertaining to the country of origin of certain girls' knitted dresses. No comments were received in response to this notice.

Facts:

The dresses were described in NY G82930 as follows:

> Both dresses have sleeveless polo shirt type styling and lettuce hems. They are made from 1 by 1 rib knit cotton fabric. The garments have shirt collars and three button plackets which fasten right over left. One dress is made of yarn dyed fabric. The other dress is made of solid color fabric and has an embroidered flower near the placket. For purposes of this ruling, we assume the dresses will be sized for girls' 7 to 16.

The dresses were properly classified under subheading 6104.42.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for, among other things, girls' knitted dresses of cotton.

Two possible manufacturing scenarios for the dresses were set forth as follows:

First Production Plan

Country A

- pattern marking and making
- piece goods are cut into component shapes
- making up of collar
- making up of the front placket and joining it to the front panel
- joining the shoulder seams of the front and back panels
- attaching the collar to the front and back panels using self fabric piping
- attaching main care labels

Country B

- making of button holes for front placket and attaching buttons
- sewing side seams of front and back panels
- sewing of sleeve using inner facing self fabric binding and topstitch (it is assumed that the operation refers to the seaming of the armhole openings since the dresses are described as "sleeveless")
- hemming of bottom lettuce edge
- cutting threads
- final inspection
- packing

Second Production Plan

Country A

- pattern marking and making

Country B

- piece goods are cut into component shapes
- making up of collar
- making up of the front placket and joining it to the front panel
- joining the shoulder seams of the front and back panels
- attaching the collar to the front and back panels using self fabric piping
- attaching main care labels

Country A

- making of button holes for front placket and attaching buttons
- sewing side seams of front and back panels
- sewing of sleeve using inner facing self fabric binding and topstitch (it is assumed that the operation refers to the seaming of the armhole openings since the dresses are described as "sleeveless")
- hemming of bottom lettuce edge
- cutting threads
- final inspection
- packing

Issue:

What is the country of origin of the subject merchandise?

Country of Origin—Law and Analysis:

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act (codified at 19 U.S.C. 3592) provides new rules of origin for

textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states that "[t]he country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "[w]here the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:"

Paragraph (e) in pertinent part states that "[t]he following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

* * * * * * *

HTSUS	Tariff shift and/or other requirements
6101–6117	(1) If the good is not knit to shape and consists of two or more component parts, a change to an assembled good of heading 6101 through 6117 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession."

Section 102.21(e) states that the country of origin for the dresses, is the country where the unassembled components are wholly assembled. Since the dresses are not assembled in a single country, Section 102.21(c)(2) is inapplicable.

Section 102.21(c)(3) states that, "[w]here the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section:

> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled."

As the subject merchandise is neither knit to shape, nor wholly assembled in a single country, Section 102.21(c)(3) is inapplicable.

Section 102.21(c)(4) states, "[w]here the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory or insular possession in which the most important assembly or manufacturing process occurred."

In NY G82930, Customs stated that the sewing of both sleeves to the main body and sewing of the side seams to join the front and back panels constituted the most important assembly processes. However, since there are no sleeves to be sewn to the main body on a "sleeveless" dress, Customs decided to revisit the matter. Although no rulings on identical merchandise were identified, Customs finds that the sewing of side seams and attachment of sleeves do not generally constitute the most important assembly processes for a girls' knit polo-style shirt. See HQ 958930, dated May 28, 1996. In HQ 958930, the most important assembly operations consisted of attaching the front and back panels by sewing the shoulder seam, forming and attaching the placket to the front panel, forming and attaching the collar and attaching rib cuffs to the sleeves. Applying this rationale, it is Customs belief that the joining of the front and back panels by sewing the shoulder seams, forming and attaching the collar and forming and attaching the placket constitute the most important assembly process for the subject dresses. Accordingly, the country of origin under the first production plan is country A and the country of origin under the second production plan is country B. This holding is also consistent with HQ 960059, dated February 24, 1997 and NY F84192, dated April 7, 2000.

Holding:

NY G82930 is hereby modified.

The country of origin of the girls' dresses in the first production plan is country A. The country of origin of the girls' dresses in the second production plan is country B.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in section 19 CFR 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). Should it be subsequently determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 CFR 177.2.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE COUNTRY OF ORIGIN MARKING OF DISPOSABLE TUBE CONTAINERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a country of origin marking ruling letter and treatment relating to the country of origin marking of disposable tube containers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the country of origin marking of disposable tube containers and to revoke any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed modification was published in Vol. 35, No. 44 of the CUSTOMS BULLETIN dated October 30, 2001.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 15, 2002.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Special Classification and Marking Branch, (202) 927–0657.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice of proposed modification of HQ 561829, dated December 15, 2000, was published in Vol. 35 of the CUSTOMS BULLETIN dated October 30, 2001. No comments were received.

As stated in the proposed modification, this modification covers any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter; internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the law. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final decision of this notice.

In Headquarters Ruling Letter ("HQ") 561829, dated December 15, 2000, (Attachment A), Customs ruled on whether foreign-made empty disposable plastic tube containers may be marked with a U.S. address and the phrase "Made in U.S.A." when the tubes will be filled in the U.S. with a U.S.-origin product. Customs held that the foreign-made tubes could not be marked with the phrase "Made in U.S.A." at the time of importation pursuant to 19 U.S.C. 1304. This ruling is in conflict with a

line of Customs rulings. For instance, in HQ 734240, dated December 24, 1991, Customs held that the phrase "Made in U.S.A." on foreign-made tubes and aerosol cans imported empty to be filled in the U.S. with U.S.-origin products would not mislead an ultimate purchaser as to the origin of the disposable container, as long as the outer container of the disposable foreign-made containers was properly marked. *See also* HQ 734781, dated December 24, 1992; and HQ 734573, dated August 10, 1992.

Based on the line of cases cited above, we find that pursuant to 19 U.S.C. 1304, the foreign-origin disposable tubes imported empty may be imported bearing the phrase "Made in U.S.A.," assuming that the disposable tubes will be filled by the ultimate purchaser of the tubes with U.S.-origin products and the outer container of the imported disposable tubes is marked with the country of origin of the tubes.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying HQ 561829, and any other rulings not specifically identified, to reflect the proper interpretation of 19 U.S.C. 1304 pursuant to the analysis set forth in HQ 562109 (see Attachment B to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: January 3, 2002.

MYLES HARMON,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 15, 2000.

MAR–2 RR:CR:SM 561829 KSG
Category: Marking

ERNESTO BUSTAMANTE
OPERATIONS MANAGER
WILLIAM F. JOFFREY, INC.
P.O. Box 698
Nogales, AZ 85628–0698

Re: Country of origin marking of imported tubes to be filled with cosmetics; 134.22(d)(2); usual container; NAFTA.

DEAR MR. BUSTAMANTE:

This is in response to your letter of July 17, 2000, on behalf of Thatcher Tubes, requesting a binding ruling concerning the country of origin marking requirements for imported tube containers. You submitted a sample for our examination.

Facts:

Thatcher Tubes plans to import empty disposable plastic tube containers and caps that are made in Mexico. Once imported into the U.S. through the port of Nogales, Arizona, the plastic tubes will be shipped to customers who will fill and seal the tubes to form the finished article. The tubes will be filled with various products of U.S. origin, including hand cream. The filled and sealed tubes will be sold to ultimate purchasers in the U.S.

The imported empty tubes will be marked with the name and address of the U.S. manufacturer of the various products (for example, hand cream) to be inserted into the tubes as well as instructions on use of the product. The sample submitted is an empty tube for Neutrogena hand cream. On the back of the tube, there is a U.S. address of Neutrogena Corporation and the phrase "Made in U.S.A."

Issue:

What are the country of origin marking requirements for imported tube containers, as described above?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended, (19 U.S.C. 1304) provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements of 19 U.S.C. 1304.

Section 134.22(d)(1), Customs Regulations (19 CFR 134.22(d)(1)), defines "usual container' as a container in which a good will ordinarily reach its ultimate purchaser. With regard to a good of a NAFTA country which is a usual container, section 134.22(d)(2) provides that:

> A good of a NAFTA country which is a usual container, whether or not disposable and whether or not imported empty or filled, is not required to be marked with its own country of origin. If imported empty, the importer must be able to provide satisfactory evidence to Customs at the time of importation that it will be used only as a usual container (that it is to be filled with goods after importation and that such container is of a type in which these goods ordinarily reach the ultimate purchaser).

In a similar case, Customs held in Headquarters Ruling Letter ("HRL") 559073, dated June 28, 1995, that empty cosmetic containers imported into the U.S. to be filled with U.S.-made cosmetics were excepted from being marked with their country of origin pursuant to 19 CFR 134.22(d)(2). However, the outermost containers in which the cosmetic containers are imported and reach the ultimate purchaser in the U.S. are required to be marked with the country of origin of the cosmetic containers. Also see HRL 560705, dated January 28, 1998.

Based on the above, we find that pursuant to 19 CFR 134.22(d), the imported tubes and caps in this case are "usual containers" and are excepted from individual marking pursuant to 19 CFR 134.22(d)(2). The outermost containers in which the tubes and caps are imported and reach the ultimate purchaser in the U.S. are required to be marked with the origin of the tubes and caps.

The term "ultimate purchaser" for a good of a NAFTA country is defined in 19 CFR 134.1(d) as "the last person in the U.S. who purchases the good in the form in which it was imported." In this case, the customers in the U.S. who fill the plastic tubes with their products would be considered the ultimate purchasers of the tubes. *See* 19 CFR 134.24(c)(1).

Section 134.46, Customs Regulations (19 CFR 134.46), as amended, provides:

> In any case in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or location in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as the actual country of origin of the article, there shall appear legibly and permanently in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

The U.S. address on the sample tube submitted is the address of the ultimate purchaser and therefore, it would not trigger the special marking requirements of 19 CFR 134.46

since the ultimate purchaser would not be confused or misled by its own address. However, it would be unacceptable under 19 U.S.C. 1304 for the imported empty tube containers to be marked "Made in U.S.A." as they are of foreign origin. Whether the tubes may be marked "Made in U.S.A." after they are filled in the U.S. is within the jurisdiction of the Federal Trade Commission.

Holding:

Pursuant to 19 CFR 134.22, the imported empty tubes and caps are usual containers and are excepted from being marked with their own country of origin. The outermost containers in which the unfinished tubes and caps are imported are required to be marked with the origin of the tubes and caps (Mexico).

At the time of importation, the empty foreign-origin tubes may not be marked "Made in U.S.A."

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

MYLES HARMON,
(for John Durant, Director,)
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
MAR–2 RR:CR:SM 562109 KSG
Category: Marking

ERNESTO BUSTAMANTE
OPERATIONS MANAGER
WILLIAM F. JOFFREY, INC.
P.O. Box 698
Nogales, AZ 85628–0698

Re: Country of origin marking of imported tubes to be filled with cosmetics; modification of HQ 561829; "Made in U.S.A." marking on disposable containers.

DEAR MR. BUSTAMANTE:

This is in reference to Headquarters Ruling Letter ("HQ") 561829, that was issued to you on December 15, 2000, on behalf of Thatcher Tubes which dealt with the country of origin marking requirements for foreign-made tubes imported empty to be filled in the U.S. We have reviewed this ruling in light of our previous rulings and have determined that the portion of HQ 561829 relating to the "Made in USA" marking on the empty tube containers is incorrect. Therefore, this ruling modifies HQ 561829 and sets forth the proper country of origin marking requirements for the foreign-origin tubes.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of HQ 561829 was published on October 30, 2001, in the CUSTOMS BULLETIN, Volume 35, No. 44. No comments were received in response to this notice.

Facts:

Thatcher Tubes plans to import empty disposable plastic tube containers and caps that are made in Mexico. Once imported into the U.S. through the port of Nogales, Arizona, the plastic tubes will be shipped to customers who will fill and seal the tubes to form the finished article. The tubes will be filled with various products of U.S. origin, including hand cream. The filled and sealed tubes will be sold to ultimate purchasers in the U.S.

The imported empty tubes will be marked with the name and address of the U.S. manufacturer of the various products (for example, hand cream) to be inserted into the tubes as well as instructions on use of the product. The sample submitted is an empty tube for Neutrogena hand cream. On the back of the tube, there is a U.S. address of Neutrogena Corporation and the phrase "Made in U.S.A."

Issue:

Whether the foreign-origin disposable tubes may be imported bearing the phrase "Made in U.S.A."

Law and Analysis:

Section 304 of the Tariff Act of 1930 (19 U.S.C. 1304), as amended, provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements of 19 U.S.C. 1304.

In Headquarters Ruling Letter (HQ) 734240, dated December 24, 1991, Customs held that the phrase "Made in U.S.A." on foreign-made tubes and aerosol cans imported empty to be filled in the U.S. with U.S.-origin products would not mislead an ultimate purchaser as to the origin of the disposable container, as long as the outer container of the disposable foreign-made container was properly marked. Therefore, the disposable containers were excepted from individual marking and the phrase "Made in U.S.A." could appear on the disposable containers at the time of importation. *See also* HQ 734781, dated December 24, 1992; and HQ 734573, dated August 10, 1992.

In this instance there is no implication that the tube is of U.S. origin; the reference plainly is to its future U.S. contents. The marking "Made in U.S.A." would not mislead an ultimate purchaser of the disposable containers, who have ample knowledge of the country of origin of the disposable tubes and know that the phrase "Made in U.S.A." is on the disposable tubes to refer to the origin of the future contents of the tubes. Provided that the outer container of the disposable tube is marked as to the origin of the disposable tubes, the country of origin marking requirements of 19 U.S.C. 1304 will be satisfied. Consistent with this ruling, we propose to modify HQ 561829.

The Federal Trade Commission ("FTC") has jurisdiction concerning the use of the phrase "Made in the U.S.A.," or similar words denoting U.S. origin. Consequently, any inquiries regarding the use of such phrases reflecting U.S. origin should be directed to Steven Ecklund at the FTC, at the following address: Federal Trade Commission, 6th & Pennsylvania Avenue, N.W., Washington, D.C. 20508 or by telephone at (202) 326–2841.

Holding:

The empty foreign-origin disposable tubes may be imported marked "Made in U.S.A.," assuming that the tubes will be filled by the ultimate purchaser of the tubes in the U.S. with U.S.-origin products and the outer container of the imported disposable tubes is marked with the country of origin of the tubes.

HQ 561829, dated December 15, 2000, is hereby modified to the extent that it is inconsistent with this ruling. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MYLES HARMON,
(for John Durant, Director,
Commercial Rulings Division.)

EXTENSION OF GENERAL PROGRAM TEST REGARDING POST ENTRY AMENDMENT PROCESSING

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This document announces that the general program test regarding post entry amendment processing is being extended for a period of one year. The test will continue to operate in accordance with the notice published in the Federal Register on November 28, 2000.

DATES: The test allowing post entry amendment to entry summaries is extended to December 31, 2002.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Chief, Entry and Drawback Management Branch, Office of Field Operations (202/927–1082).

SUPPLEMENTARY INFORMATION:

Customs announced and explained the post entry amendment processing test in a general notice document published in the Federal Register (65 FR 70872) on November 28, 2000. That notice announced that the test would commence no earlier than December 28, 2000, and run for approximately one year. In fact, the test is scheduled to operate through December 31, 2001.

Briefly, the test allows importers to amend entry summaries (not informal entries) prior to liquidation by filing with Customs either an individual amendment letter upon discovery of an error or a quarterly tracking report covering any errors that occurred during the quarter. The previously published general notice explained how to file post entry amendments for revenue related errors and non-revenue related errors, and the consequences of misconduct by importers during the test. It also provided that there are no application procedures or eligibility requirements. This document announces that the test is being extended to December 31, 2002. To participate in the test, an importer need only follow the procedure set forth in the previously published general notice.

Comments received in response to the previously published general notice have been reviewed and the test is being evaluated. Changes to the test based on the comments and the evaluation will be announced in the Federal Register in due course. The test may be further extended if warranted. Additional information on the post entry amendment procedure can be found under "Importing and Exporting" at http://www.customs.gov.

Dated: December 31, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, January 7, 2002 (67 FR 768)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Herbert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 01–152)

NIPPON STEEL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., LTV STEEL CO., INC., GALLATIN STEEL, IPSCO STEEL, INC., STEEL DYNAMICS, INC., AND WEIRTON STEEL CORP., DEFENDANT-INTERVENORS

BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., AND LTV STEEL CO., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NIPPON STEEL CORP., DEFENDANT-INTERVENOR

Consolidated Court No. 99–08–00466

[Final judgment ordering specific weight conversion factor.]

(Dated December 27, 2001)

Gibson, Dunn & Crutcher LLP (Daniel J. Plaine, Gracia M. Berg) for plaintiff Nippon Steel Corporation.

Robert D. McCallum, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Kyle Chadwick), John D. McInerney, Elizabeth C. Seastrum,* and *Linda S. Chang,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer and *John J. Mangan)* for defendant-intervenors Bethlehem Steel Corporation, U.S. Steel Group, a unit of USX Corporation, Ispat Inland, Inc. and LTV Steel Company, Inc.

Schagrin Associates (Roger B. Schagrin) for defendant-intervenors Gallatin Steel, IPSCO Steel Inc., Steel Dynamics, Inc., and Weirton Steel Corporation.

OPINION

RESTANI, *Judge:* Plaintiff Nippon Steel Corporation ("Nippon") challenges the Final Results of Redetermination Pursuant to Court Remand ("Third Remand Results") by the United States Department of Commerce ("Department" or "Commerce") in *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 Fed. Reg. 24,329 (Dep't Comm. 1999) *("Final Determ.").* Commerce's sole charge on the third

remand was to devise a new approach to determine neutral facts available because Commerce had unreasonably selected weighted average margins for theoretical-weight sales under its previous methodology. *See Nippon Steel Corp. v. United States*, No. 99–08–00466, Slip Op. 01–122, at 11 (Ct. Int'l Trade Oct. 12, 2001) *("Nippon III")*. Nippon argues that Commerce has not developed a new methodology at all but has merely "repackaged" its previous approach. Familiarity with the previous opinions ordering remand is presumed. *See Nippon Steel Corp. v. United States*, 146 F. Supp. 2d 835 (Ct. Int'l Trade 2001) *("Nippon II"); Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366 (Ct. Int'l Trade 2000) *("Nippon I")*.

This matter stems from Nippon's failure to timely provide weight conversion data for U.S. sales of its products ("CONNUMs") made on a theoretical-weight basis and Commerce's subsequent methodology for calculating a substitute dumping margin. It is customary for steel customers to purchase products based upon a theoretical weight, which may be different from the actual weight of the product delivered. The weight conversion factor is a simple ratio to reflect this discrepancy. The weight conversion factor primarily compares the actual weight of products upon delivery to the theoretical weight purchased by the customer. This ratio is used to extrapolate the actual amount delivered where only theoretical information is provided so that Commerce can calculate the proper margin. Nippon failed to initially provide weight conversion data and Commerce, as a result, was required to fill the informational gap based on the facts available. *See* Statement of Administrative Action, accompanying H.R. Rep. No. 103–826(I), at 869, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198 ("SAA").

Instead of filling this particular gap with a substitute weight conversion factor, Commerce bypassed the weight conversion analysis entirely and created substitute margins for the theoretical-weight sales. *See Nippon III* at 7.[1] In doing so, the Department calculated margins specific to the individual products. Commerce's methodology made a distinction between products sold entirely on a theoretical weight basis ("exclusively-theoretical CONNUMs" or "pure CONNUMS"), and products sold based upon a combination of theoretical and actual weight ("mixed CONNUMs"). For each mixed CONNUM, Commerce calculated a weighted-average margin for the theoretical-weight sales based on the same product's actual-weight sales. For each exclusively-theoretical CONNUM, Commerce calculated a weighted average based on the actual-weight sales from all of the mixed CONNUMs.

The court recognized that Commerce may adopt a new methodology to complete its margin calculation instead of directly replacing the missing information so long as that methodology is reasonable. *See Nippon III* at 9 n.5. The court rejected Commerce's methodology in *Nippon III* because the substitute margins calculated by the Department were con-

[1] These steps resulted in an overall dumping margin of 18.39%.

trary to the evidence and were unreasonable. *See id.* at 8–9. The court found that the margins necessarily contained an implicit weight conversion factor that suggested Nippon had delivered several times more steel than U.S. customers actually purchased. *See id.* at 8 n.4. Because that illogical result was inherently punitive and, therefore, not appropriate in a neutral facts available context, Commerce was ordered to devise a new approach.

In the Third Remand Results, Commerce largely maintained its previous methodology. Commerce's approach to mixed CONNUMs is identical to that in *Nippon III*. Commerce continued to apply the margin based on each product's actual-weight sales. Commerce's only substantive change was in calculating the margin for exclusively-theoretical CONNUMs. Commerce modified its approach by substituting a margin based on a weighted average of *all* reported U.S. actual-weight sales instead of a weighted average of Nippon's few actual-weight sales. Nippon argues that Commerce has not meaningfully changed its methodology as ordered. Nippon claims that by changing only the exclusively-theoretical CONNUM methodology, Commerce did not address the majority of products at issue here and, therefore, failed to comply with the court's order.[2] Nippon overstates the breadth of the court's directive. The court did not require that Commerce completely overhaul its entire methodology. The court merely required Commerce to bring its assumptions more in line with reality.

Nonetheless, the court takes no position on whether Commerce's methodology is reasonable as a general matter. In this case, Commerce must bear the responsibility for its conduct. Commerce attempts to justify its previous approach, which it largely continues, by attempting to rebut Nippon's prior argument that Commerce's substitute margin contained a grossly inflated implicit weight conversion factor.[3] Commerce now argues that Nippon's calculations determining the implicit weight conversion factor were incorrect.[4] In advance of oral argument, Commerce was specifically asked to address the implicit weight conversion factor at oral argument and it failed to do so in any meaningful way. Because Nippon had raised this specific argument at the agency level without meaningful response, and because Commerce then ignored the court's explicit request for a response, the court in *Nippon III* deemed it futile to ask Commerce again to justify its methodology in this regard. In this fourth installment, the court refuses to further extend litigation by reopening the issue. It would be fundamentally unfair to prolong litigation and require Nippon to substantively respond to Commerce's be-

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[2] Nippon points out that, of the [ ] CONNUMs at issue here, only [ ] are exclusively-theoretical CONNUMs. Those [ ] exclusively-theoretical CONNUMs represent only [ ] percent of the quantity of combined products in this matter.

[3] In *Nippon III*, the court noted that Commerce's margin contained an implicit weight conversion factor of [ ] suggesting that Nippon delivered approximately [ ] times more steel than its U.S. customers ordered.

[4] Commerce argues that a proper application of a theoretical-to-actual weight conversion factor would also include adjustments to other variables besides quantity, including gross unit price and expenses. Commerce now explains that the quantity is multiplied by the weight conversion factor while the combined gross unit price and expense amount is divided by the weight conversion factor. Commerce argues that Nippon's calculations included only the former and are, therefore, incorrect.

lated justifications, regardless of their merit. Therefore, without rejecting Commerce's methodology in general, the court rejects its application here.

Nippon requests that the court direct Commerce to use a particular margin by adopting Nippon's suggested weight conversion factor of [ ]. This court previously declined to adopt Nippon's untimely submitted weight conversion data stating that, "[d]epending on necessity, it is Commerce's decision whether to use this data." *Nippon III* at 10 n.6. The court notes, however, that Nippon's suggested weight conversion factor is only [ ] lower than the imputed weight conversion factor of [ ] found by Commerce in the Third Remand Results. Because the difference is slight and because Commerce is not permitted to extend litigation by ignoring court inquiries, the court will put the matter to rest by directing Commerce to use Nippon's weight conversion factor. It should be noted that Nippon's initial error was a technical one of inadvertent untimely submission. There is no reason to believe its data is incorrect. At this point, Commerce's right to protect the efficiency of its administrative proceedings must yield to the rights of the parties and the court to meaningful adjudication of disputes.

CONCLUSION

Commerce is ordered to substitute a weight conversion factor of [ ] to determine Nippon's margins.

(Slip Op. 01–153)

NIPPON STEEL CORP., KAWASAKI STEEL CORP., ACCIAI TERNI S.P.A., AND ACCIAI TERNI (USA), PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND ALLEGHENY LUDLUM CORP., AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, ZANESVILLE ARMCO INDEPENDENT UNION, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, DEFENDANT-INTERVENORS

Consolidated Court No. 01–00103

Foreign producers of grain-oriented silicon electrical steel ("Plaintiffs") filed complaints contesting affirmative injury determination sustained by three-to-three vote in the context of sunset review conducted by the International Trade Commission ("ITC"). Plaintiffs challenged, among other things, validity of the ITC's procedures in conducting vote sustaining affirmative injury determination, and resulting antidumping duty orders; and sought discovery to obtain evidence substantiating certain of their allegations. The ITC moved to have Counts One and Two of Plaintiffs' complaints dismissed asserting court lacked jurisdiction over matters alleged therein or, in the alternative, that Plaintiffs lacked standing. In addition, the ITC moved to quash Plaintiffs' discovery requests. The Court of International Trade, Eaton, J.: (1) denied the ITC's motion to dismiss, finding court had jurisdiction pursuant to 28 U.S.C. 1581(c) (1994) and Plaintiffs had standing; and (2) granted Plaintiffs' discovery requests.

[ITC's motion denied; Plaintiffs' discovery requests granted.]

(Dated December 28, 2001)

Gibson, Dunn & Crutcher, LLP (Joseph H. Price, Douglas R. Cox, Gracia M. Berg, Gregory C. Gerdes), for Plaintiff Nippon Steel Corporation.

Arent Fox Kintner Plotkin & Kahn, PLLC (Robert H. Huey, Matthew J. Clark, Nancy A. Noonan, Steven F. Hill, Timothy D. Osterhaus), for Plaintiff Kawaski Steel Corporation.

Hogan & Hartson, LLP (Lewis E. Leibowitz, Steven J. Routh, David E. Leitch, T. Clark Weymouth, David P. Kassebaum), for Plaintiffs Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA, Inc.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Gracemary Rizzo),* for the ITC.

Collier Shannon Scott, PLLC (Kathleen W. Cannon, Michael J. Coursey, Eric R. McClafferty, John M. Herrmann, Grace W. Kim), for Defendant-Interveners Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC.

OPINION AND ORDER

EATON, *Judge:* Before the court is the motion of the United States International Trade Commission ("ITC" or "Commission") to dismiss Counts One and Two of the complaints filed by Nippon Steel Corporation ("Nippon"), Kawaski Steel Corporation, Acciai Terni S.p.A. and Acciai Terni (USA) (collectively "Plaintiffs") and to quash Plaintiffs' related discovery requests made pursuant to USCIT R. 33, 34, and 36.

By their complaints in this consolidated action, Plaintiffs challenge the ITC's affirmative material injury determination in the context of a five-year sunset review with respect to imports of grain-oriented silicon

electrical steel from Italy and Japan. *See Grain-Oriented Silicon Elect. Steel From Italy and Japan*, 66 Fed. Reg. 12,958 (Mar. 1, 2001); *see also* USITC Pub. No. 3396 (Feb. 26, 2001) *("Final Results")*. Counts One and Two of these complaints claim that the ITC's final determination:

> [W]as not in accordance with law because of the crucial deciding vote of Dennis M. Devaney, who was not lawfully appointed to be an ITC commissioner at the time of that vote.[1] Specifically, Plaintiffs allege * * * that the attempted recess appointment of Mr. Devaney was invalid because there was neither a Senate recess nor a vacancy on the ITC at the time of the purported [recess] appointment.

(Pls.' Mem. Opp'n to Def.'s Mot. Dismiss at 2 (citation omitted); *see also* Nippon Compl. Count One ¶¶ 18, 19; Count Two ¶¶ 27, 28.) Plaintiffs also seek discovery to obtain evidence to substantiate their allegations.

The ITC moves[2] to dismiss Plaintiffs' Counts One and Two by asserting that this court "lacks subject matter jurisdiction under both 28 U.S.C. § 1581(c) and (i); and plaintiffs lack standing to challenge the President's recess appointment of Commissioner Devaney * * *." (Def.'s Mem. Supp. Mot. Dismiss at 1–2.) In addition, the ITC seeks to quash Plaintiffs' discovery requests. *(Id.* at 2.) For the reasons set forth below, the court denies the ITC's motion and grants Plaintiffs' discovery requests.

STANDARD OF REVIEW

Where a party's "12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a 'facial' attack on the pleading—then those allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Moreover, "[a] 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction * * *." *Fed. Election Comm'n v. Nat'l Rifle Assoc.*, 553 F. Supp. 1331, 1343 (D.D.C. 1983) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

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[1] Each Plaintiff filed a complaint in this consolidated action. While Counts One and Two of each complaint take issue with the manner of Mr. Devaney's appointment as to: (1) the validity of the recess appointment; and (2) the existence of a vacancy, they do not do so in the same order. For purposes of this opinion, the court follows the order of the Nippon complaint.

[2] Here, the ITC challenges the court's jurisdiction pursuant to USCIT R.12(h)(3), which states, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." However, since subsection (h) preserves the defense of subject matter jurisdiction so that it might be raised at any time in an action, the court understands the ITC to have intended to challenge the court's jurisdiction pursuant to USCIT R. 12(b)(1), "Defenses and Objections * * * By Pleadings or Motion * * *."

BACKGROUND

By its *Final Results*,[3] the ITC sustained the existing antidumping duty orders on grain-oriented electrical silicon steel from Italy and Japan by finding that "revocation of the[se] antidumping orders * * * would likely lead to continuation or recurrence of material injury to an industry in the United States * * *." *See Final Results* at 1 (footnote omitted). The ITC reached this finding by a three-to-three—i.e., evenly divided—vote of its Commissioners and, thus, the antidumping duty orders remained in effect pursuant to 19 U.S.C. § 1677(11).[4] The three persons voting in the affirmative were Stephen Koplan, Marcia Miller and Dennis M. Devaney. According to the ITC,

> Commissioner Devaney was appointed to the Commission by President Clinton on the morning of January 3, 2001, before the Senate returned to session later that same day.[5] Commissioner Devaney was appointed to the Commission seat, which at the time of his appointment was occupied by Commissioner Thelma Askey, a holdover commissioner. Commissioner Askey had been appointed by President Clinton in 1998. Commissioner Askey's term had expired on December 16, 2000, but she continued to serve at the Commission until her successor, Commissioner designee Devaney, was qualified. Pursuant to 19 U.S.C. 1330(b)(2), "any commissioner may continue to serve as a commissioner after an expiration of his term of office until his successor is appointed and qualified." Commissioner Devaney took his oath of office on January 16, 2001.

(Def.'s Mem. Supp. Mot. Dismiss at 2–3 (citation omitted).)

Following publication of the *Final Results* Plaintiffs filed their actions, which, among other things, challenge the legitimacy of the procedures by which Mr. Devaney assumed office and, therefore, the lawfulness of his participation in the vote sustaining the affirmative injury determination. In Count One of these complaints, Plaintiffs assert that the process by which Mr. Devaney assumed office was not lawfully completed during a Senate recess and, therefore, "[b]ecause Dennis Devaney's alleged appointment to the ITC was invalid, his vote [on the *Final Results* was] invalid." (Compl. ¶ 18.) Plaintiffs further allege that "[a]s a result of Dennis Devaney's invalid vote and determination, the

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[3] 19 U.S.C. § 1675(c) reads as follows:

> (1) In general * * *
>
> 5 years after the date of publication of—
>
> (A) * * *. an antidumping duty order * * *
>
> the administering authority and the Commission shall conduct a review to determine * * * whether revocation of the * * * antidumping duty order * * * would be likely to lead to continuation or recurrence of dumping * * * and of material injury.

19 U.S.C. § 1675(c)(1)(A) (1994). The antidumping duty orders that were the subject of the sunset review were published on June 10, 1994, and August 12, 1994, respectively. *See Antidumping Duty Order: Grain-Oriented Elect. Steel From Japan*, 59 Fed. Reg. 29,984 (June 10, 1994); *Antidumping Duty Order: Grain-Oriented Elect. Steel From Italy*, 59 Fed. Reg. 41,431 (Aug. 12, 1993).

[4] This subsection provides,

> If the Commissioners voting on a determination * * * are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination.

19 U.S.C. § 1677(11) (1994).

[5] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their Next Session.

U.S. CONST. art. II, § 2, cl. 3.

Commission's determination * * * was not in accordance with law." *(Id.* ¶ 19.) In like manner, Plaintiffs' Count Two alleges that, because no vacancy existed at the time Mr. Devaney assumed office, Mr. Devaney was not lawfully appointed and, thus, ineligible to vote on the Commission's determination leading to the *Final Results.* Because of these alleged irregularities, Plaintiffs ask the court to "[d]eclare unlawful Dennis Devaney's vote and determination with regard to the *[Final Results]*" and "[d]eclare that the ITC shall instruct the U.S. Department of Commerce to revoke the antidumping order[s] * * *." (Compl. at 10, 11.)

To substantiate their allegations, Plaintiffs seek discovery "to elicit information uniquely in [the ITC's] control concerning, *inter alia,* the legal and procedural aspects of the purported appointment of Mr. Devaney on January 3, 2001, including information about the time at which the President signed Mr. Devaney's commission." (Pls.' Mem. Opp'n to Def.'s Mot. Dismiss at 2.)

By its motion, the ITC asserts that this court lacks subject matter jurisdiction over Counts One and Two of Plaintiffs' complaints. As to Plaintiffs' claim that jurisdiction lies under 28 U.S.C. § 1581(c),[6] the ITC contends:

> [P]laintiffs are challenging the President's exercise of his constitutional powers of recess appointment with respect to the Commission. The question of whether President Clinton properly invoked his power to make a recess appointment is at the heart of plaintiffs' allegations * * * and the substance of those allegations cannot be made to fit within the carefully tailored scope of the Court's subject matter jurisdiction under Section 1516a(a)1.[7] The exercise of the President's recess appointment authority is neither a factual finding nor a legal conclusion upon which the instant sunset review determination is based.

(Def.'s Mem. Supp. Mot. Dismiss at 5.)

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[6] The statute provides, in relevant part:

> Civil actions against the United States and agencies and officers thereof * * *.
>
> (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a].

28 U.S.C. § 1581(c) (1994).

[7] The ITC probably intended to cite a different subsection of 1516a which states:

> The determinations which may be contested under subparagraph (A) are as follows * * *
>
> (iii) A final determination, other than a determination reviewable under [19 U.S.C. § 1516a(a)](1), by the administering authority or the Commission under section 1675 of this title.

19 U.S.C. § 1516a(a)(2)(B)(iii) (1994); further, subparagraph (A) states that, in contesting such determination,

> [A]n interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing * * * a complaint * * * contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A). Judicially reviewable final determinations under this subparagraph include five-year sunset reviews. *See* 19 U.S.C. 1675(c).

As to Plaintiffs' alternative claim that the court has jurisdiction under 28 U.S.C. § 1581(i),[8] the ITC similarly contends that Plaintiffs are asking "this Court to construe provisions of the Constitution and to determine whether the President acted in accordance with its provisions in making the contested recess appointment." (Def.'s Mem. Supp. Mot. Dismiss at 7.)

In the alternative, the ITC questions Plaintiffs' standing by asserting that, even if Commissioner Devaney's recess appointment were unlawful, Plaintiffs, nonetheless, do not have an individually protected interest in the President's exercise of his power of appointment under the Constitution. *(Id.* at 8–9.)

Finally, the ITC contests Plaintiffs' discovery requests on the grounds that "[i]n * * * challenging [the] Commission's final determinations, whether pursuant to [28 U.S.C. §§] 1581(c) or 1581(i), the scope of review is confined to information contained in the administrative record." (Def.'s Mem. Supp. Mot. Dismiss at 17–18.)

Discussion

The court does not find the ITC's arguments convincing. Rather than asking the court to review the President's exercise of his recess appointment power under the Constitution, Plaintiffs, by their complaints, are merely seeking review of the ITC's adherence to its procedures in reaching its decision in the *Final Results.* In other words, Plaintiffs wish the court to determine whether the Commissioners of the ITC allowed someone who was not a Commissioner to cast a vote in the determination of the *Final Results*.[9] That this court has the jurisdiction to decide matters relating to the procedures employed by the ITC in reaching a final determination is well settled. *Koyo Seiko Co. v. United States,* 13 CIT 461, 464, 715 F. Supp. 1097, 1099–100 (1989) (quoting *PPG Indus. v. United States,* 2 CIT 110, 113, 525 F. Supp. 883, 885 (1981) ("It is not disputed that the court under * * * § 1581(c) [has] jurisdiction * * * [and, therefore,] 'all procedural considerations should be decided by this Court [once] the final agency determination is made.'")); *Montgomery Ward & Co. v. Zenith Radio Corp.,* 673 F.2d 1254, 1260 (C.C.P.A. 1982) ("'[D]eterminations' must be made in accordance with delineated procedures * * *. Thus, the merits of a determination, as well as its procedural correctness, are subject to judicial review."). At no point does the ITC question the court's authority to hear and decide the merits of the

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[8] Section 1581(i) of Title 28, which provides for the court's residual jurisdiction, states:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section. This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable * * * by the Court of International Trade under [19 U.S.C. § 1516a (1994)] * * *.

28 U.S.C. § 1581(i)(4) (1994).

[9] Section 1330 states, *inter alia,* "The United States International Trade Commission * * * shall be composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate." 19 U.S.C. § 1330(a) (1994); section 1675a provides, *inter alia,* "In a review conducted under section 1675 * * * (c) of this title, the Commission shall determine whether revocation of an [antidumping duty] order * * * would be likely to lead to continuation or recurrence of a material injury * * *." 19 U.S.C. § 1675a(a) (1994).

substantive issues raised in Plaintiffs' complaints; nor would there be any basis for the ITC to do so, since the court clearly has jurisdiction to hear substantive issues relating to a five-year sunset review. *See, e.g., Chefline Corp. v. United States*, 25 CIT ____, Slip Op. 01–118 (Sept. 26, 2001). As such matters are now properly before the court, so too are matters of procedure relating to them. This being the case, as the question of who is entitled to cast a vote on an ITC final determination is surely a question of procedure, it is surely within the competence of this court to hear such question. Thus, the court finds that it has jurisdiction, in the context of an affirmative finding of injury in a five-year sunset review, to hear procedural questions relating thereto, including the claims found in Counts One and Two of Plaintiffs' complaints.[10] 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(iii).

It is worth noting that, should the court ultimately find for the Plaintiffs, complete relief can be afforded them within the confines of the ITC itself. *Compare Swan v. Clinton*, 100 F.3d 973, 989 (D.C. Cir. 1996) (Silberman concurring) ("We could thus compel all officials at the Board to treat Swan as the rightful incumbent and, consequently, to ignore Wheat, at least officially.").

Next, the court turns to the question of standing to sue. The ITC asserts that Plaintiffs lack standing based on its argument that Plaintiffs:

> [H]ave no individually protected interest that the President properly exercise his appointment power with respect to the Commission[] [and that] they do not have an individually protected interest that only persons appointed by the President and confirmed by the Senate make up the Commission.

(Id. at 8–9.) However, the court has found that the President's appointment power is not at issue in this case. Rather, at issue are the procedures employed by the ITC in reaching the final determination contained in the *Final Results*.[11] As a result, since the Plaintiffs may have suffered "injury in fact" from the ITC's determination, and are "arguably within the zone of interest sought to be protected" by a five-year sunset review, Plaintiffs have standing. *Duty Free Int'l, Inc. v. United States*, 16 CIT 163, 163–64 (1992) (quoting *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53 (1970)); 19 U.S.C. § 1675(c); 5 U.S.C. § 702 (1994).

Moreover, despite the ITC's arguments to the contrary, a constitutionally based "individually protected right" is not a prerequisite for the Plaintiffs to have standing to contest the issues raised by Counts One and Two of their complaints. *Transcom, Inc. v. United States*, 182 F.3d

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[10] As the court finds that it has jurisdiction to hear the matters raised in Counts One and Two of the Plaintiffs' complaints pursuant to 28 U.S.C. § 1581(c), it need not address the question of whether it has subject matter jurisdiction under 28 U.S.C. § 1581(i).

[11] Plaintiffs also satisfy the requirement that: (1) they be "interested parties," within the meaning of 19 U.S.C. 1677(9); and that (2) they participated in the proceedings before the ITC leading to the *Final Results*. *See* 28 U.S.C. § 2631(c); *Brother Indus., Ltd., v. United States*, 16 CIT 150, 151–52, 787 F. Supp. 1454, 1455–56 (1992) (citing *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1199–1201, 704 F. Supp. 1075, 1081–82 (1988)) ("The statute requires that [the] part[ies] must be interested and must have participated before the ITC."); *see also* 64 Fed. Reg. 41,433 (July 5, 2000); *Final Results* at 3, App. B–5.

876, 880 (Fed. Cir. 1999) ("[W]e need not address [plaintiff]'s argument that * * * the scope of the administrative reviews violated [its] rights under the due process clause of the Fifth Amendment to the Constitution, because we hold that Commerce's conduct in this case violated Commerce's statutory and regulatory * * * obligations in connection with the administrative reviews.").

Finally, the court turns to the issue of discovery. While discovery is not normally permitted in a case brought pursuant to 28 U.S.C. § 1581(c), *see Saha Thai Steel Pipe Co., Ltd. v. United States*, 11 CIT 257, 259, 661 F. Supp. 1198, 1201 (1987) (citation omitted), it has been allowed under other than normal circumstances. *See NEC Corp. v. United States*, 21 CIT 198, 205–06, 958 F. Supp. 624, 631–32 (1997); *see also Atl. Sugar, Ltd. v. United States*, 85 Cust. Ct. 131, 131 (1980) ("Th[e] instances of review on the record in which interrogatories were permitted were either cases of apparent incompleteness of the record * * * or clear failures to articulate the administrative findings * * *." (citations omitted)). "Plaintiffs may [, however,] engage in discovery outside the administrative record if they demonstrate that there is a reasonable basis to believe the administrative record is incomplete." *Saha Thai Steel Pipe Co., Ltd.*, at 261–62, 661 F. Supp. at 1202 (citing *Tex. Steel Co. v. Donovan*, 93 F.R.D. 619, 621 (N.D. Tex. 1982); *Natural Res. Def. Counsel, Inc. v. Train*, 519 F.2d 287, 291–92 (D.C. Cir. 1975)).

Here, by offering to supplement the record with additional documents *(see, e.g.,* Def.'s Mem. Supp. Mot. Dismiss, Attach. 1 (Declaration of G. Timothy Saunders ("Saunders Declaration")), Attach. 2 (letter from Nash to Askey of 1/02/01 ("Nash Letter"))) the ITC acknowledges that the record is incomplete. These documents, though useful, each answer some questions while raising others. For instance, the Nash Letter indicates that Mr. Nash had the authority to"reliev[e] [Ms. Askey, effective January 2, 2001,] of [her] position and responsibilities as a member of the International Trade Commission." (Nash Letter at 1.) In the Saunders Declaration, Mr. Saunders appears to agree that the Nash Letter "served as notice to the Executive Clerk's Office that a vacancy existed in Ms. Askey's former seat on the USITC." (Declaration at 1.) This, despite statutory language providing "any commissioner may continue to serve as a commissioner after an expiration of his term of office until his successor is appointed and qualified." 19 U.S.C. § 1330(b)(2). Thus, there appears to be a certain amount of uncertainty as to how the vacancy was created and when, since the earliest date claimed for Mr. Devaney's appointment is January 3, 2001. *(See* Def's Mem. Supp. Mot. Dismiss at 2–3.) Plaintiffs also seek to supplement the record with the affidavit of Joseph H. Price, which raises significant questions not put to rest by the ITC's offered documents:

> Plaintiffs have reason to believe that evidence in Defendant's control will likely rebut the Saunders Declaration's contention that something called a "recess appointment order" effectuated Mr. Devaney's purported recess appointment at 10:20 a.m. on January 3, 2001. As discussed in more detail in Plaintiffs' Opposition, estab-

> lished legal precedent shows that an appointment to the ITC takes place *when the President signs a commission*—not when the President approves a so-called "recess appointment order."
>
> [Moreover], the Saunders Declaration * * * does not mention the time at which President Clinton signed Mr. Devaney's ITC commission—thus raising the distinct likelihood that the commission was not signed during a recess of the Senate. Plaintiffs therefore have reason to believe that discovery regarding the exact time at which Mr. Devaney's commission was signed by President Clinton will likely lead to evidence that will rebut the Saunders Declaration and create an issue of material fact concerning the time at which the purported recess appointment was completed.

(Pls.' Mem. Opp'n Def.'s Mot. Dismiss, Ex. 4 ¶¶ 9, 10. (citation omitted; emphasis in original)) The court need not pass on the legal questions concerning the creation of a vacancy, or the distinctions between a "recess appointment order" and a Presidential "commission" to find that "there is a reasonable basis to believe the administrative record is incomplete." *Saha Thai Steel Pipe Co., Ltd.*, at 261–62, 661 F. Supp. at 1202. Here, an examination of the record reveals that the facts needed to either substantiate or refute the allegations found in Counts One and Two of the complaints are not present, nor would they normally be. Plaintiffs' requests for discovery are, therefore, granted.

CONCLUSION

For the reasons set forth above, the court denies the ITC's motion to dismiss Counts One and Two of Plaintiff's complaints, and grants Plaintiffs' requests for discovery.

(Slip Op. 01–154)

NIPPON STEEL CORP., NKK CORP., KAWASAKI STEEL CORP., AND TOYO KOHAN CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR

Court No. 00–09–00479

[ITC injury determination remanded.]

(Dated December 31, 2001)

Willkie Farr & Gallagher *(William H. Barringer; James P. Durling; Daniel L. Porter; Sean M. Thornton; Karl von Shriltz)* for plaintiffs.

Lyn M. Schlitt, Office of General Counsel, *James M. Lyons*, Deputy General Counsel, U.S. International Trade Commission *(Laurent deWinter)*, for defendant.

Schagrin Associates *(Roger B. Schagrin)*, for defendant-intervenor.

OPINION

RESTANI, *Judge:* Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd., (collectively "Nippon" or "Plaintiffs"), respondents in the underlying investigation, move for judgment upon the agency record pursuant to USCIT Rule 56.2. At issue is the final determination of the International Trade Commission (the "Commission") in *Tin- and Chromium-Coated Steel Sheet From Japan*, 65 Fed. Reg. 50005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Aug. 2000) (hereinafter "Final Determination"). Nippon first contests the Commission's final affirmative material injury determination in the Tin- and Chromium-Coated Steel Sheet (TCCSS) investigation on the grounds that political interference with the Commission's deliberations violated Plaintiff's right to procedural due process. Second, Nippon challenges the Commission's use of aggregated data in making its injury determination, and contends that its findings with respect to the effects of subject import volume and prices are not supported by substantial evidence. Third, Nippon argues that the Commission did not adequately assess alternative causes of material injury.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581 (c) (1994). The court will uphold the Commission's determination in antidumping investigations unless it is "unsupported by substantial evidence in the administrative record or is otherwise not in accordance with law." 19 U.S.C. § 1516(a)(2)(B)(i).

FACTUAL AND PROCEDURAL BACKGROUND

The Commission initiated an antidumping investigation of TCCSS imports[1] pursuant to a petition filed in November 1999 by Weirton Steel

[1] The Department of Commerce ("Commerce") defined the imported merchandise within the scope of the investigation generally as "tin mill flat rolled products that are coated or plated with tin, chromium or chromium oxides." *Tin-and Chromium-Coated Steel from Japan*, 65 Fed. Reg. 39,364, 39,365 (Dep't Comm. 2000) (final determ.).

Corporation ("Weirton") and two labor unions. None of the other six U.S. producers of TCCSS joined the petition, but all participated in the investigation.[2] *See Final Staff Report* at III–1, C.R. Doc. 145, App. Tab 1. The Commission held a hearing on November 18, 1999, at which it heard testimony from the parties and industry representatives. *Prelim. Hr'g Tr.* at 72–83, 87–98, P.R. Doc. 18, App. Tab 3.

In December 1999, the Commission issued an affirmative preliminary determination of material injury. *See Tin- and Chromium-Coated Steel Sheet From Japan*, 64 Fed. Reg. 71497, USITC Pub. 3264, Inv. No. 731–TA–860 (Dec. 1999) at 13–14 (Preliminary Determination). On June 29, 2000, the Commission held a public hearing at which four of the largest TCCSS purchasers in the U.S. market testified, as did seven Members of Congress, including U.S. Senator John D. Rockefeller IV. Tin- and Chromium-Coated Steel Sheet from Japan: Hearings before the United States International Trade Commission 44–54 (June 29, 2000) (hereinafter "Hr'g Tr."). In June 2000, the Department of Commerce issued final antidumping duty margins as follows: 95.29 percent for Kawasaki, 95.29 percent for Nippon, 95.29 percent for Toyo Kohan and 32.52 percent for all others. *See* 65 Fed. Reg. 39,364 (Dep't Comm. June 26, 2000).

In August 2000, the Commission, in a 4–2 vote, determined that Japanese imports of TCCSS were being sold at less than fair value ("LTFV") and, as a result, were both materially injuring and threatening further material injury to an industry in the United States. *See* Final Determination at 1. In evaluating the relevant factors, the Commission first concluded that Japanese import prices "depressed and suppressed domestic [producers'] prices to a significant degree." *Id.* at 27. This conclusion rested principally on several factual findings regarding, *inter alia*, (1) the existence of "underselling" by Japanese suppliers; (2) the industry practice of establishing prices via negotiations for annual requirements contracts; (3) the relative importance of non-price factors; and (4) allegations of lost sales and lost revenue because of subject imports. Second, the Commission concluded that the volume of subject imports grew rapidly over the period of investigations. *Id.* at 12. Finally, the Commission concluded that the domestic industry's financial performance was poor throughout the period of investigation, with the worst results coinciding with the largest increase in imports during the first three quarters of 1999. *Id.* at 25.

Nippon appeals the Commission's final determination of material injury, claiming that Senator Rockefeller's testimony appeared to and did impermissibly influence the Commission's final determination. Nippon also contests the Commission's findings with respect to volume, price effects, and overall causation of injury.

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[2] Non-petitioners include the following producers: Bethlehem Steel Corp., LTV Steel Co., National Steel Corp., USS Posco Industries Inc., Ohio Coatings Co., and U.S. Steel Group.

DISCUSSION

I. Congressional Interference

During the final phase of the investigation, Senator Rockefeller testified before the ITC Commissioners at a public hearing on June 29, 2000. After expressing his view on the state of the domestic industry, Senator Rockefeller related his perceptions regarding the legislative intent behind the addition of the requirement that the Commission analyze "conditions of competition" under 19 U.S.C. § 1677(7)(C). Senator Rockefeller stated:

> From what I understand, what is occurring here at the Commission is that lawyers and economists representing foreign competition or U.S. buyers, who can't argue about the numbers that your staff has gathered, are spending their time before the Commission arguing about conditions of competition and taking the focus away from the statute, which is called the law insofar as I'm aware. I find this deeply disturbing, and I hope, perhaps vainly, that the Commission will seriously reconsider the matter. There should be no need for Congressional action.

Hr'g Tr. at 50–51 , P.R. Doc. 74, App. Tab 4. Nippon claims that Senator Rockefeller's reference to "Congressional action" constituted an impermissible "threat" to reduce Congressional appropriations to a subdivision of the ITC. Nippon argues that its due process rights were violated because this alleged threat not only had the fatal appearance of partiality but also actually interfered with the ITC's decision-making process.[3]

Antidumping proceedings are not adjudicatory but investigatory.[4] *See NEC Corp. v. United States*, 21 CIT 933, 948–49 (1997) (citing H.R. Rep. No. 96–317, at 77 (1979); S. Rep. No. 96–249, at 100 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486, and *Budd Co. v. United States*, 1 CIT 67, 72, 507 F. Supp. 997, 1001 (1980)), *aff'd*, 151 F.3d 1361 (1998). The test for improper interference in an administrative proceeding that is neither judicial nor quasi-judicial is "whether the Congressional action actually affected the decision." *Peter Kiewit Sons' Co. v. U.S. Army Corps. of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983) (citing *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1246–47 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)). Thus, Nippon's assertion that Senator

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[3] Defendant argues that Nippon failed to exhaust its remedies before the Commission by not objecting to Senator Rockefeller's testimony during the administrative proceedings. Section 2637(d) of Title 28 of the United States code directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." "By its use of the phrase 'where appropriate,' Congress vested discretion with the court to determine the circumstances under which it shall require the exhaustion of administrative remedies." *FAG Kugelfischer Georg Schafer AG v. United States*, 131 F. Supp. 2d 104, 113 (2001); *see also Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Ct. Int'l Trade 1998). "[T]he Court has exercised its discretion to obviate exhaustion where requiring it would be futile, *see Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984), or the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency." *Id.*; *see also R.R. Yardmasters of America v. Harris*, 721 F.2d 1332, 1337–39 (D.C. Circ. 1983). Whether a Member of Congress impermissibly interfered with an antidumping investigation based on participation in a hearing is a question of law, requiring no further factual findings beyond what is already on the record, including the hearing transcript. Further, the usefulness of an objection to the testimony after the fact is doubtful. Therefore, we reach Nippon's arguments.

[4] The court does not read *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001) (finding unfair trade proceedings *akin* to final adjudications for purposes of deference to statutory interpretation) to change this basic fact. For example, basic core findings must be made without regard to the claims of the parties, *ex parte* factual submissions are permitted, there is no administrative law judge, and there is no formal record prior to the final determination.

Rockefeller's statement gives the "appearance of impropriety" misstates the applicable standard.

Even if a more stringent standard applies, Nippon's claim fails. First, there is no prohibition against Members of Congress testifying at public hearings before the Commission.[5] Second, the Senator's statement that "there should be no need for Congressional action" does not appear to be a "threat" to reduce appropriations to the Commission or any subdivision thereof. Senator Rockefeller is not on the appropriations committee and there is no evidence that he was behind the proposal to reduce appropriations for the Office of Economics at the International Trade Commission. Indeed, the context of Senator Rockefeller's comment strongly suggests that he was indicating his view that it should be unnecessary for Congress to have to revise the statute. His testimony centers on his perception that the Commission was misinterpreting the purpose of the statutory requirement that the Commission evaluate "conditions of competition."[6] Irrespective of whether Senator Rockefeller's interpretation of the statutory mandate to analyze "conditions of competition" is accurate, the Commission is presumed to apply the law properly. *NEC Corp.*, at 1372 (quoting *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982)) ("It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the Plaintiff to prove otherwise."). Third, there is nothing in the record to support a finding that Senator Rockefeller's testimony affected the Commission's decision-making at all. The Commission's determination is considered and replete with citation to and analysis of the factual findings in the Staff Report. Accordingly, Nippon fails to establish that Senator Rockefeller's testimony improperly affected the Commission's decision, or that it gives an appearance of partiality by the Commission.

II. Material Injury

To determine whether the subject imports have caused material injury to a domestic industry, the Commission is required to consider three factors: (1) the volume of the subject imports; (2) the effect of the subject imports on prices of domestic like products; and (3) the impact of the subject imports on domestic producers of like products. *See* 19 U.S.C. § 1677(7)(B). Nippon disputes the Commission's findings with respect to volume and price effects. Although Nippon does not directly challenge the Commission's findings regarding the impact on the domestic industry, Nippon does dispute the Commission's overall conclusion that

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[5] Presumably, Members of Congress know something about the state of industries within their districts or states. It is less likely that individual Members of Congress can provide meaningful post-enactment legislative history, but they are not forbidden from opining thereon.

[6] Senator Rockefeller had stated that the legislative intent in adding the requirement that the ITC evaluate "conditions of competition" was, in his words, "to make clear that even in situations where the unfair trading occurred during an upward phase of the demand cycle, material injury by law now could nevertheless be caused by unfair imports." Hr'g Tr. at 49. Accordingly, he concluded, "[i]n the context of business cycles and conditions of competition, the Commission should not flip, but has, our intent around and make negative decisions based on your analysis of conditions of competition." *Id.* at 50.

material injury was "by reason of" subject imports. *See* 19 U.S.C. § 1673d(b).

A. Volume

Under 19 U.S.C. § 1677(7)(c)(1), the Commission shall consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." "It is the significance of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX Corp. v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987); *see also Atlantic Sugar, Ltd. v. United States*, 2 CIT 18, 23, 519 F. Supp. 916, 921–22 (1981). There is no minimum rate of increase in subject import volume or a baseline percentage of market share for subject imports, above which volume will be considered "significant." Congress has specified that "for one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant." H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979); *see also* S. Rep. No. 96–249, 96th Cong., 1st Sess. at 88 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case."). Thus, for the Commission's findings under section 1677(7)(C)(1) to be supported by substantial evidence, the Commission must analyze the volume and market share data in the context of conditions of competition. This is especially crucial where, as here, subject imports represent a small percentage of market share relative to that held by the domestic industry.[7]

1. Domestic Market Share and Apparent Domestic Consumption

In determining the significance of subject import volume, the Commission must assess the extent to which, if at all, subject imports "captured" market share from the domestic industry over the POI. This inquiry typically entails accounting for an increase or decrease in domestic producer's market share and in domestic consumption overall. *See, e.g., Taiwan Semiconductor Indus. Ass'n v. United States*, 118 F. Supp. 2d 1250, 1258 (Ct. Int'l Trade 2000) (sustaining Commission's negative material injury determination based on a finding that volume lacked significance in relative terms where there was a "substantial increase in U.S. apparent consumption" and there was a greater market share held by non-subject imports). For the volume of subject imports to be considered significant, there is no requirement that subject imports account for *all* of the decline in domestic industry's market share. It is sufficient that the Commission point to evidence showing that subject imports captured a substantial portion of market share from the domestic industry.

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[7] Relative to consumption of TCCSS in the United States, the market share of subject imports in terms of quantity was [ ] percent in 1997; [ ] percent in 1998; [ ] percent in 1999; and [ ] percent in the first quarter of 2000. Final Determination at 12–13 (citing Staff Report at Table IV–4). The market share held by the domestic industry in terms of quantity was as follows: [ ] percent in 1997; [ ] percent in 1998; [ ] percent in 1999; and [ ] percent in the first quarter of 2000.

Here, the Commission found that, in absolute terms, tons imported from Japan increased by 85.9 percent between 1997 and 1999 and "continued to increase rapidly through the first quarter of 2000." Final Determination at 12.[8] The Commission calculated that "the quantity of subject imports increased by 35.6 percent between 1997 and 1998; by 37.0 percent between 1998 and 1999; and was 8.1 percent higher in the first quarter of 2000 than in the first quarter of 1999." Final Determination at 12. After apparently deeming these absolute increases in volume facially significant, the Commission determined that because the increase in volume of subject imports took place over a period of declining domestic consumption, the increase in market share of subject imports over the POI was also significant.[9]

The record reflects that the domestic producers' market share did in fact decline over the POI, as did domestic consumption overall.[10] Nippon does not dispute these facts. The record shows that the amount by which domestic producers lost market share over the POI is significantly higher than the overall increase in non-subject import market share.[11] Thus, there is substantial evidence to support the conclusion that Japanese imports displaced a significant portion of the domestic industry's declining market share.

2. Regional Concentration of Competition

Notwithstanding evidence of the concurrent decline in domestic market share and consumption, Nippon claims that the Commission did not adequately account for characteristics of the TCCSS market that would preclude a finding that subject import volume was significant. Nippon does not, and indeed could not, assert that the Commission was *required* to conduct a market segmentation analysis. Rather, Nippon asserts that the Commission must support its finding of significance by at least taking into account regional concentration of shipments as a "condition of

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[8] The quantity of imports of the subject merchandise from Japan was 181,287 short tons in 1997; 245,872 short tons in 1998; 336,961 short tons in 1999; and 98,854 short tons in the first quarter of 2000. Staff Report at Table IV–4.

[9] The Commission found that relative to consumption of TCCSS in the United States, "the quantity of imports of the subject merchandise increased by [ ] percentage points between 1997 and 1998; by [ ] percentage points between 1998 and 1999; and was [ ] percentage points higher in the first quarter of 2000 than in the first quarter of 1999." The Commission calculated that "the quantity of subject imports, relative to consumption of TCCSS in the United States increased by [ ] percentage points between 1997 and 1999, and continued to increase rapidly through the first quarter of 2000." Final Determination at 13.

[10] The Final Determination relied on Table IV–4 of the Staff Report, which shows that the market share (in terms of value) held by the domestic industry was as follows: [ ] percent in 1997; [ ] percent in 1998; [ ] percent in 1999; and [ ] percent in the first quarter of 2000; *see also* Staff Report at Table IV–3 (indicating total U.S. consumption in 1997 as [4,005,513] short tons; in 1998 as [ ]; and in 1999 as [ ], a net decline of [ ] short tons). The court notes that the Commission's finding of a net decline in total apparent U.S. consumption differs somewhat from the characterization found in the Staff Report. *See* Staff Report at IV–4 ("[t]otal U.S. consumption of TCCSS remained relatively stable during the period examined"). Even if consumption is more properly characterized as remaining "stable" over the POI, this does not detract from the substantiality of the Commission's findings. Total U.S. consumption need not in all cases be in decline for an increase in the volume of subject imports to be significant. As the ultimate determination to be made is whether subject imports displaced domestic product, there is nothing to support the proposition that subject import volume cannot be considered significant where U.S. consumption is stable or even increasing, depending on other market indicators that speak to such displacement. For example, in *Companhia Paulista de Ferro-Ligas v. United States*, 20 CIT 473, 476–77 (1996), the court sustained the Commission's affirmative material injury determination where volume of subject imports rose by over 200 percent and the importers' share of domestic consumption increased substantially, notwithstanding evidence of stable or increasing domestic market share.

[11] The market share of domestic producers decreased by 7.7 percentage points over the POI. Market share of subject imports in terms of value are as follows: [ ] (1997); [ ] (1998); [ ] (1999); [ ] (first quarter of 2000), an overall increase of 5 percentage points. In comparison, non-subject market share in terms of value are as follows: [ ] (1997); [ ] (1998); [ ] (1999); and [ ] (first quarter of 2000), an overall increase of 2.7 percentage points. *See* Staff Report at Table IV–4.

competition." In this case, the court agrees, as apparently does the Commission.[12]

Though ultimately deeming the TCCSS market "national," the Commission described the conditions of the market in terms of regional concentration of competition. The Commission stated:

> The market for TCCSS is a national market. While most domestic producers are located in the East and Midwest and many tend to ship much of their production to destinations near their plants, one U.S. producer * * * is located on the West Coast, and another * * * ships nearly half of its volume to purchasers located on the West Coast. With one exception * * * all domestic producers sell to purchasers on the West Coast, notwithstanding the fact that generally they must absorb the cost of transporting their shipments to these purchasers. Moreover, Japanese merchandise also competes throughout the United States. Indeed, only non-subject imports do not compete throughout the United States, as significant head-to-head competition in the West is limited to U.S. and Japanese TCCSS.

Final Determination at 10.

In its volume analysis, the Commission found that "imports from Japan to the West Coast did not attenuate subject imports' negative impact on the domestic industry as a whole" for three reasons: (1) the TCCSS market is a national market where "U.S. producers, although mainly located in the East and the Midwest, compete throughout the United States"; (2) subject imports increased over the period of investigation "not only in the West Coast but also in the remainder of the United States," while domestic shipments declined throughout the country; and (3) the only U.S. producer located on the West Coast experienced declines in shipments, price, and financial performance similar to those declines experienced by other domestic producers over the same period." Final Determination at 13–14.

a. Attenuated Competition

Nippon claims that competition was so attenuated as to preclude a finding that the volume of subject imports was "significant" on the ground that domestic TCCSS producers concentrate on local sales. In support of its conclusion that domestic producers compete nationally, the Commission relied on data in the Staff Report regarding shipments to the West by domestic producers expressed as a percentage of each pro-

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[12] The Commission does not argue that regional concentration of competition or subdivisions of a market, either in product or geographic terms, cannot constitute a "condition of competition" that may or may not vitiate a finding that subject import volume was significant. There is no statutory requirement that the Commission conduct a "market segmentation" analysis in any particular case. "[N]either the governing statute nor its legislative history requires adoption of any particular analysis where a market may consist of several segments." *Acciai Speciali Terni, S.p.a. v. United States*, 19 CIT 1051, 1056 (1995) (citing *Copperweld Corp. v. United States*, 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988)). That a "market segmentation" analysis may not be required in all cases, however, does not absolve the Commission of its general duty to analyze volume or price effects in terms of relevant conditions of competition. Although the question of the importance of market segmentation often relates to *product* subcategories, *see, e.g., Encon Indus. v. United States* 16 CIT 840, 842 (1992), it is clear that geographic concentration of sales may also be a condition of competition potentially having an effect on the significance of import volume and price effects.

ducer's total domestic shipments.[13] Each domestic producer was assigned a percentage that covered the entire POI rather than for each year. The Staff Report indicated that competition among firms was characterized by geographical concentration of sales: "[N]one of the [U.S.] firms possesses a dominating market share. However, U.S. producers are geographically spaced and tend to concentrate on certain regions of the United States to minimize freight cost and shipping times, with some territorial overlap with other producers." Staff Report at III–2. The Staff Report did not indicate that this geographical concentration was of such extent that regions of the country are insulated from competition. That producers may concentrate on local sales is not inconsistent with the Commission's finding that producers compete nationally, and does not necessarily equate to insubstantial competition with Japanese imports.

There is no evidence that subject imports to the East and Midwest were insubstantial, much less non-existent.[14] Thus, although Japanese imports compete *more directly* with domestic product in the West, Japanese imports apparently compete throughout the country with all producers. Nippon has not pointed to any evidence that Japanese imports affected the East and Midwest in so attenuated a fashion as to preclude any adverse impact on the domestic industry as a whole in terms of volume or price. The court therefore declines Nippon's invitation to secondguess the weight the Commission assigned the volume of Japanese imports shipped to the West or to the rest of the country, nor will the court recalibrate the relative degree of intensity of competition across these regions.

b. Correlation

Nippon argues that the data disaggregated according to geographical zones of competition shows a lack of correlation between the decrease in domestic market share and the increase of subject import volume. Nippon asserts the Commission majority's findings of a consistency in trends across the country is factually incorrect because (1) the two principal West Coast suppliers actually increased their shipments to the West from 1998 to 1999;[15] and (2) western areas of direct Japanese-U.S. competition fared better financially than the rest of the country, as evi-

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[13] The Staff Report describes domestic shipments to the West as follows: [ ] Staff Report at III–2 n.2. Actual amounts shipped to the West by these producers were not indicated, nor were separate percentages available for each year under investigation. Many of the purchasers apparently have locations across the country and purchase volume was not listed by facility, so the court is unable to reconstruct domestic shipments by region simply by putting purchasers in groups according to region.

[14] Nippon states that [ ] of Japanese imports are shipped to the West and the remainder is shipped to the East and Midwest. Nippon asserts that "subject import market share was very low [ ] in the Eastern United States—the region of the country in which six of the seven U.S. producers had their operations." Nippon Br. at 41. Nippon does not make clear to the court why this figure should be considered *de minimis*, or why it is so low that it could not have any demonstrable adverse effect on the domestic industry, especially in light of the Staff Report's finding that no single U.S. producer enjoys a dominant position in the U.S. TCCSS market.

[15] Nippon states that shipments from these two producers, [ ], "*actually increased* from about [ ] short tons in 1998 to [ ] short tons in 1999." Nippon Br. at 40 (citing Staff Report at III–2 n.2) (emphasis in original). Nippon apparently arrived at these figures by applying the percentage of total sales that were shipped by [ ] to the West over the POI, *see* note 13 *supra*, to the total amounts shipped in each year, and then adding the figures, [ ].

denced by the relative performance of the only U.S. producer located on the West Coast.

Nippon's statement that the only two principal West Coast producers increased their shipments to the West from 1998 to 1999 is misleading in that, by omitting data for 1997, it avoids the question of whether shipments by these suppliers increased *overall* during the POI. Under Nippon's method for calculating these 1998 and 1999 figures, the total shipments to the West by these two producers in 1997 is higher than in 1998 or 1999.[16] Thus, there is a net decline in shipments by these two producers to the West over the POI, under Nippon's own methodology.

Even if the combined total of shipments to the West by these two producers did increase from 1997 to 1999, the record supports the Commission's conclusion that the financial performance of the U.S. producer located on the West Coast deteriorated as did the other U.S. producers, even if only somewhat less rapidly.[17] The Commission is not under an obligation to find an *exact* correlation between subject import volume and financial performance, nor must the data be devoid of any inconsistencies. The Commission's overall trend analysis of the data of a particular producer's shipments and financial performance is sufficient to support its conclusions.

Accordingly, the court finds that in isolation the Commission's determination with respect to the significance of subject import volume is supported by substantial evidence. Under the "substantial evidence" standard of review, however, "the court must determine whether ITC's conclusions are supported by the evidence on the record *as a whole*." *USX Corp.*, 11 CIT at 84, 655 F. Supp. at 489 (emphasis in original). Therefore, this court must determine whether the Commission's conclusions with respect to price effects of subject imports is supported by substantial evidence.

B. Effect of Subject Imports on Domestic Prices

Under 19 U.S.C. § 1677(7)(C)(ii), "[i]n evaluating the price effects of subject merchandise on prices, the Commission shall consider whether (I) there has been a significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." Nippon

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[16] Applying Nippon's methodology to the data, the court finds that the two producers shipped a total of [ ] short tons in 1997. That is, [ ]. The court notes that Commissioner Askey stated that "[t]he quantity of domestic shipments made by the two producers [ ] increased from [ ] thousand short tons in 1997 to [ ] thousand short tons in 1999," yet provided no citation for the source of this data. Nippon does not indicate whether it adopts Commissioner Askey's calculations for 1997 or cite to any underlying source material that would indicate year-specific percentages for shipments to the West by each producer individually or by the industry as a whole.

[17] *See* Staff Report at Table VI–3. Results of operations for [ ] show net declines in (1) Net Sales in short tons by quantity, [ ] in 1997; [ ] in 1998; and [ ] in 1999; (2) Operating Income, [ ] in 1997; [ ] in 1998; [ ] in 1999; (3) Gross Profit in terms of value, [ ] in 1997; [ ] in 1998; [ ] in 1999. The data does show, however, a slight recovery in 2000 in terms of Operating Income and Gross Profit for this producer: [ ] Operating Income was [ ] for the first quarter of 2000, as compared with [ ] in the first quarter of 1999, while Gross Profit in the first quarter of 2000, however, was [ ] as compared with [ ] in the first quarter of 1999. This slight upturn in financial indicators during the first quarter of 2000 does not detract from the Commission's findings regarding the overall financial performance of this producer during the POI.

claims that the majority's methodology of using aggregate pricing data skewed its underselling analysis and masked a lack of correlation between subject imports and the decline in TCCSS prices. Nippon also claims that the Commission lacked substantial evidence to support its findings with respect to (1) price sensitivity; (2) the purchasers' use of Japanese pricing in negotiating with U.S. suppliers; and (3) lost sales and revenue allegations.

1. Methodology

a. Underselling

The Commission majority determined that the frequency and magnitude of underselling increased "dramatically" over the POI. Final Determination at 16. With respect to the frequency of underselling, the Commission majority found that "in 1997, four bids out of thirteen [30 percent of comparisons made] undersold the domestic producers' bids. In 1998, seven out of sixteen [44 percent] bids undersold domestic bids. By 1999 that number had risen to 21 out of 25 [84 percent] bids." *Id.* (citing Staff Report at V–22).[18] The Commission further found that there was a significant increase in the magnitude of the underselling while "in 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average." *Id.*

Nippon challenges the ITC's finding of underselling on the ground that a particular purchaser[19] reported separate bidding information for three different tin-mill products purchased at each of its three facilities, while the other large purchasers submitted a unified pricing chart detailing a single bid price for each supplier. Nippon argues that data for this purchaser was consequently "over-represented" on account of the Commission's methodology of counting "instances" of underselling without regard to the actual volumes purchased. The Commission contends that its reliance on aggregate pricing data is consistent with Commission practice and has been sustained by this court.

(1) Aggregate Pricing Data

As a preliminary matter, generally the Commission is not obligated to conduct a price comparison analysis that accounts for variations in sales volumes. *See, e.g., Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1024 (1989) (sustaining price comparisons based on largest quarterly sales). Nor is the Commission generally required to make a disag-

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[18] In contrast, the Commission in the Preliminary Determination analyzed underselling by comparing weighted average f.o.b. prices and quantities for U.S. producers with those for Japanese producers. *See* Preliminary Determination at Tables V–1 to 3. The court also notes that in the Preliminary Determination, the Commission calculated prices from the discount rate, thereby facilitating comparison of the purchasers' purchasing history. It is not clear why the Commission chose to revert to presenting data in terms of discount rate for some purchasers and price for others. On remand, the Commission shall present pricing data in as consistent a manner as possible to facilitate review.

[19] This purchaser is [ ].

gregated analysis of material injury. *See Copperweld Corp.*, 12 CIT at 166, 682 F. Supp. at 569. The court in *Copperweld* reasoned as follows:

> Section 1673d(b)(1) required that the [Commission] make and publish a final determination of whether a 'domestic industry' is materially injured by reason of the subject imports. The domestic industry is further defined as 'the domestic producers as a whole of the like product. 19 U.S.C. § 1677(4)(A). This language makes manifestly clear that Congress intended the [Commission] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports.'

Id.

Nevertheless, where the Commission chooses to limit its underselling analysis to a subset of the pricing data available, the Commission must indicate the criteria it used for making the price comparisons. Neither the Final Determination nor the Staff Report explain the methodology used for making price comparisons. The Staff Report merely states that the price comparison table "shows a summary of the number of cases in which the Japanese product's final bid price was (1) below all final bids by the U.S. producers, (2) within the range of U.S. final bids, and (3) above all U.S. prices." Staff Report at V–22. At oral argument, the Commission explained that it based its underselling calculations solely on the number of individual bids from purchasers that purchased from both Japanese and domestic suppliers in a particular year, irrespective of volume, but it does not explain in the Final Determination or in its Response Brief its reason for doing so, or why it chose to reject the quarterly weighted average price calculations made in the Preliminary Determination. Why underselling was judged on such a narrow basis is not clear to the court. The Commission has not pointed to any previous case in which it limited price comparisons in the manner it did here when it had access to a similar set of specific pricing data. Thus, although the Commission generally has the discretion to choose a methodology for analyzing underselling, where it chooses to limit the set of data for comparison, the Commission is at least under an obligation to explain to the court the manner in which it determined an "instance" of underselling, or in some way enable the court to review its calculations and reasoning process. The Commission has not met this obligation in this case.

In addition, the Commission must account for differences in the way that data is reported in order to ensure that its calculations are accurate. The Commission has the discretion to fashion its questionnaires in whatever manner it sees fit. Once the data is received, however, the Commission cannot ignore the manner in which the data is presented, and the Commission cannot rely on the number of instances of underselling without first taking into account how the underlying data is grouped. The Commission is not bound to present the data in the exact manner in which they were reported. In this case, the Commission does not explain in the Final Determination why a particular purchaser's

three facilities were counted separately.[20] At oral argument, the Commission explained that each the three facilities negotiated independently from one another and from any central corporate headquarters, yet did not address whether this is the case for the other purchasers who reported volume and pricing data. The court does not accept this insufficient "post hoc rationalization." *See U.H.F.C. Co. v. United States,* 916 F.2d 689, 700 (Fed. Cir. 1990) ("Post hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination.").[21]

(2) Margin of Underselling

As stated above, the Commission found that "[i]n 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average." Final Determination at 16. The Final Determination cites to an apparently non-existent "Table V–16" as support for its margin of underselling figures. If this table existed, it appears that it was removed from the final version of the Staff Report, thereby precluding any meaningful review of the Commission's conclusions in this regard. Furthermore, the Commission has not met its burden of establishing why these margins, assuming the figures are accurate, are significant. For example, it may be that 2.156 percent—the average margin of underselling over the POI—falls within the range of price differentials that purchasers on the whole indicated would induce them to switch suppliers, but the Commissioners did not analyze the magnitude of selling in relation to this information. *See* Questionnaire, at Question IV–11. Logically, a rapid rate of increase nonetheless may be immaterial if, for example, the margin never goes above a price differential that would cause purchasers to change suppliers to any significant degree. Nor did the Commission analyze whether the undisputed lead-time advantage held by the domestic industry in fact translated into an ability to maintain a price premium over imports, which may or may not account for the margin of underselling.[22]

The Commission need not analyze every piece of data it receives. Nevertheless, where information is available that would give meaning to the figures used to support a determination, the Commission should use it, or at least explain why such information is unusable. The Commission must be careful not to solicit information from purchasers regarding their decision-making criteria merely as a formality. Nor should the Commission invoke "rate of increase" to support its findings without

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[20] [ ]

[21] Similarly, the Commission does not explain why for this particular purchaser it counted separately each type of product purchased by an individual canning company. Nor does the Commission explain whether other purchasers who provided separate data according to product type were similarly considered separately. *See, e.g.,* Staff Report at Table V–6 (purchaser provided separate data for "tin-plate" and "chromium-coated steel sheet"), & Table V–7 (purchaser provided data for "TCCSS-Double Rolled," "Chromium Cuatro Coils" and "TCCSS—Single Rolled").

[22] The Staff Report indicates that "[l]ead times from U.S. producers varied between 6 and 12 weeks, with most producers reporting delivery within 6 to 8 weeks. For imports, lead times ranged from 2.5 months to 7 months, with 6 of the 11 importers reporting lead times in the 3 to 4.5 month range." Staff Report at II–13.

providing some context that would reveal why the increase is significant for the purposes of determining material injury.

Therefore, on remand, the Commission shall explain its methodology for making price comparisons, and why this methodology was chosen over that used in the Preliminary Determination. It also shall present purchasing history in a way that will facilitate review of pricing/volume trends, e.g. weighted average prices, either industry-wide or by individual purchaser, on a quarterly or yearly basis. The Commission must present the data in a reasonably consistent manner with respect to purchaser and product grouping, as well as the expression of prices bid and paid. The Commission also must indicate the basis for its margin of underselling analysis, and indicate why this particular margin is significant.

b. Correlation of Subject Imports to a General Decline in Prices

The Commission found that "the evidence shows a clear trend of generally declining prices paid by purchasers over the period of investigation."[23] Final Determination at 15. The Commission grouped the data into those purchasers reporting in terms of price actually paid and those reporting the amount of discount from the annually announced list price.[24] The Commission found that (1) for four major purchasers, discounts from all sources of supply (domestic, Japan, and others) increased for each period examined, and (2) for companies reporting in terms of bid prices, "domestic prices were mixed between 1997 and 1998 * * * but down across the board (except for [one purchaser] in 1999)." Final Determination at 15 n.66. The Commission also found that, in conjunction with this general decline in domestic prices, "Japanese price movements were mixed between 1997 and 1998 * * * but down across the board (except for [the same purchaser noted previously] in 1999." Thus, the Commission linked the general decline in domestic prices to overall trends in Japanese pricing.

Nippon does not dispute the Commission's finding that prices paid to domestic suppliers generally declined over the POI.[25] Rather, Nippon claims that the majority ignored detailed bidding information submitted by the purchasers demonstrating that subject import prices could not have negatively impacted domestic prices. Nippon asserts that "the Commission's focus on aggregate pricing data is fundamentally flawed, and ignores the lack of any correlation between purchases of subject import by *individual customers* and declines in domestic TCCSS prices." Nippon Br. at 18.

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[23] The Commission noted that "[e]ven though the list price increased slightly from 1997 to 98, discount rates increased significantly in both years resulting in a net decline in prices. In 1999, this trend was magnified by the fact that domestic producers were not able to increase the list price while discount rates continued to increase." Final Determination at 15.

[24] Most domestic producers enter into annual supply contracts, the price of which is negotiated as a discount of a list price announced every autumn by one of the domestic producers.

[25] The court notes that the quarterly weighted-average pricing data compiled in the Preliminary Determination shows a decline in U.S. prices. In the first quarter of 1996, U.S. prices were $706.02 (Product One), $656.88 (Product Two), and $620.49 (Product Three). By the third quarter of 1999, U.S. prices were $621.21, $622.71, and $577.31, respectively.

Nippon contends the following facts contravene a finding of such a correlation: (1) the largest purchasers of subject imports generally paid increased prices to domestic suppliers; (2) those who purchased no subject imports were able to secure price decreases from their domestic suppliers. Pricing trends for a particular large purchaser may indicate the lack of a correlation between the existence of competition with Japanese imports and a decline in prices paid by that particular purchaser.[26] Other large purchasers of TCCSS seem to have paid increased or unchanged domestic prices when lower-priced subject imports were present, and in many cases paid decreasing amounts where no subject imports in fact competed for the purchasers' business.[27] In the absence of a table with average industry-wide pricing, on a quarterly basis or otherwise, the court is unable to make a more thorough assessment of the Commission's conclusions. If the Commission deems the evidence apparently contradicting a finding of correlation somehow unimportant, the Commission must state its reasons for so finding. Clearly, a general decline in domestic prices is relevant to the extent it can be correlated to a decrease in Japanese import prices. The Commission is not required in all cases to determine the relationship between subject import competition and domestic prices on an individual purchaser basis. Nevertheless, where the other data is so mixed and where data is available to determine whether such a correlation existed for particular purchasers, and is relied on by respondents,[28] the Commission must address the individual purchaser data in some manner.

2. Substantial Evidence

a. Price Sensitivity

In describing conditions of competition in the Final Determination, the Commission recognized that "[t]he record indicates that non-price factors such as product quality, product consistency, and on-time delivery are very important." Final Determination at 8. The Commission found, however, that "the record also reflects that during annual contract negotiations, price is a critical factor. The market is therefore characterized by a high degree of price sensitivity." *Id.* The Commission does not cite any record evidence to support its conclusion. In analyzing price effects of the subject imports, however, the Commission specified that (1) the domestic TCCSS market is concentrated with respect to both purchasers and suppliers, and (2) "price, in the form of discount rates, is negotiated intensely, often down to the hundredths of one percent." Final Determination at 15. Nippon claims these criteria are not meaning-

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[26] Although [ ] consistently satisfied [ ] of its TCCSS requirements from Japanese suppliers, it apparently paid prices [ ] than other domestic TCCSS purchasers. Heinz Questionnaire Response, at Question II–1, C.R. Doc. 222, Pl. App. at Tab 8; Staff Report at Table V–4a, b, c.

[27] The record shows that [ ] obtained price decreases in each year of the POI notwithstanding the lack of any purchases from Japan. Staff Report at Table V–6. Similarly, data for [ ] show that U.S. producers were generally able to increase prices in 1999 notwithstanding the introduction of lower-priced bids from subject imports. Staff Report at Table V–2.

[28] *See* 19 U.S.C. § 1677f(i)(3)(B) (1994); *see also Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1359–60 & n.7 (Ct. Int'l Trade 2001) (finding that under the new statute, the Commission is required to respond to parties' material and reasonable arguments with a "reasoned explanation").

ful, and further claims that the Commission's finding of price as a "critical" factor is contradicted by the purchasers' testimony at hearings and in questionnaire responses, according to which reliability and quality were repeatedly cited as most determinative of their purchasing decision, whereas price was ranked seventh in order of importance.

(1) Market Concentration and Price Specificity

The Commission did not make clear why the fact that there are a small number of purchasers and suppliers is necessarily indicative of price sensitivity, as markets that are not particularly concentrated may still exhibit a high degree of price sensitivity for any number of reasons. Nor is it apparent why the degree of price *specificity* in negotiations would be necessarily indicative of price *sensitivity*, since the Commission is presumably not precluded from finding a lack of price sensitivity in markets that do not exhibit similar degrees of price specificity.[29] In light of the lack of any precedent in which these two factors alone or in combination supported, without more, a finding of price sensitivity, the court finds that the Commission's explanation for its finding of price sensitivity insufficient.

(2) Non-price Factors

Nippon's assertions that purchaser testimony and questionnaire responses reveal that price is not considered the most important factor miss the mark. A finding of "price sensitivity" is not precluded by the fact that price is not the *most* important factor. For example, the court in *Acciai*, 19 CIT at 1059–60, found that the Commission's finding as to importance of price was supported by evidence where the only two purchasers of a particular import, though not listing price as the most important factor in decision-making, listed price as "a very important factor," and indicated that a five to ten percent rise in import price would cause them to switch to domestic producers.

In this case, unlike in *Acciai*, the Commission did not evaluate purchaser responses regarding the amount of a price increase necessary to induce them to switch suppliers. *See* Purchaser Questionnaires at Question IV–8. Nor did the Commission account for the role of nonprice factors in purchaser decision-making in any meaningful way.[30] In making its price sensitivity finding, rather than evaluate purchasers' assessments of non-price factors such as ontime delivery or product quality, or whether these other factors actually drove their decision to switch suppliers, the Commission simply noted that other non-price factors were

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[29] The Commission cited several documents in support of its price specificity finding, including one May 18, 1998 internal document of [ ] in which [ ] proposed discount rate of [ ] percent is contrasted with other suppliers' discount rate of [ ] percent. Final Determination at 14 n.65. The Commission explains in its brief that "[w]hen a difference as small as [ ] in price means potentially losing substantial amounts of business, it was reasonable for the Commission to conclude that this industry is price sensitive." ITC Br. at 36. The Commission's statement is misleading because the bids discussed are expressed in discount rate, rather than straight price per ton. Under the Commission's reasoning, evidence of prices expressed in amounts to the dollar would in all cases support a finding of price sensitivity.

[30] The Commission did discuss a particular domestic producers' on-time performance in terms of whether the declining health of the domestic industry could be attributed to subject imports or some other cause. *See* discussion, *infra*, section C.

also considered "important."[31] The Commission cannot determine price sensitivity in a vacuum. The focus of the price sensitivity inquiry is apparently on the degree to which price is a determining factor in the mind of the purchaser in making its purchasing decision. Therefore, if the Commission chooses to rely on price sensitivity to support its price effects determination, it must assess other aspects of the TCCSS industry that would tend to reduce if not entirely vitiate, the importance of price in purchaser decision-making. In this case, it is insufficient merely to acknowledge that non-price factors are considered "very important" without discussing the nature of these factors in the industry or relating them to its overall determination, as such factors may eclipse the importance of price in purchaser decision-making.

b. Negotiating Practices

The Commission found that "the record reflects that the aggressive pricing by importers of Japanese TCCSS has been used by at least some purchasers in their price negotiations with the domestic suppliers, and Japanese supply is recognized as an important factor affecting U.S. prices." Final Determination at 16. The Commission deemed not credible testimony by four large purchasers that imports from Japan have no effect on TCCSS prices. The Commission found that, contrary to a particular purchaser's testimony, negotiations with importers "often take place simultaneously with domestic supply negotiations," citing this purchaser's documentation referencing negotiations with Japanese suppliers that were taking place in the fall and winter, while negotiations with domestic suppliers were still ongoing.

The court may not question the weight the Commission assigns to particular testimonial evidence. Nevertheless, the Commission's rejection of the purchasers' *entire* testimony is not supported by adequate reasoning. It is not inconsistent for domestic producers to negotiate with purchasers at the same time as Japanese producers, yet in their negotiations remain or at least consider themselves insulated from competition from Japanese pricing. Thus, even if the purchaser inaccurately represented the timing of negotiations,[32] the Commission must still address the documentary evidence that supports the purchaser's contention and fundamental point that negotiations run on separate tracks according to different procedures and criteria.[33] First, the

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[31] The record indicates that seven of thirteen reporting purchasers described price as "very important," and six described price as "somewhat important." Staff Report at Table II–4. The record also indicates that other factors ranked higher than price, e.g., "delivery time" was listed as "very important" by nine purchasers and "somewhat important" by four; and all responding purchasers indicated "quality" as "very important." *Id.* Overall, price was ranked seventh of approximately ten factors. It is not appropriate for the court to make an assessment of the weight that should be given these data, if any. Nevertheless, where results are, as here, mixed with respect to purchaser assessments of the relative importance of price in decision-making, the Commission should evaluate the other factors cited by purchasers, or at least the amounts they cite as sufficient to warrant changing suppliers. The Commission may articulate a reason why the purchasers' assessment of decision-making criteria is not to be accorded weight, but without an analysis of these factors, a thorough review of the Commission's determination in this regard is impossible.

[32] The court notes that there is in fact some inconsistency in this purchaser's representations to the Commission. In [ ] questionnaire response, it indicated that:

[ ].

Questionnaire Response, C.R. Doc 243, 244, Pl. App. Tab 12 at 18–1 to 2 (emphasis added).

[33] [ ]

Commission does not address evidence of supply agreements whereby domestic producers are obligated to match prices with only other domestic producers.[34] Second, the Commission has not assessed whether the acknowledged difference in lead-times cause purchasers to consider foreign supply "supplementary," and allocate predetermined volumes to foreign and domestic supply sources. *See* Testimony of Mr. Rourke of B-Way, Hr'g Tr. at 220 ("We also will mitigate the risk by choosing a finite number of specifications to give an off-shore source. And typically in our case it may be heavier runners, things that will supplement other specifications that we're getting from others.").

In addition, the Commission sidesteps the question of whether Weirton's internal documents belie its contentions that it adjusted pricing according to competition from Japanese imports. The Commission had solicited from Weirton at the public hearing documents to support its claim that subject import pricing damaged its negotiating leverage. In its submitted response, Weirton conceded that "the competitors listed on the [competitive pricing memoranda sent from the sales department to the pricing department] are always other domestic firms." *See* Affidavit of David Gill, Petitioner's Post-hearing Br. at Exh. 20.[35] This documentary evidence is consistent with purchasers' testimony that each year domestic producers negotiate only within a set range of a list price announced by a particular domestic producer, and that foreign prices are not established until after domestic contracts have been signed. Hr'g Tr. at 202–203. In an affidavit, however, Weirton stated that this evidence should be discounted because a particular purchaser indicated the availability of lower priced Japanese imports during negotiations. Weirton Post-Hearing Br. at Exh 20. The Commission deemed the affidavit credible "because the statements made therein about the intentions of two major purchasers to increase their purchases of Japanese TCCSS due to its low prices is borne out by the purchasing history of these two companies.[36] As the Commission mentions the purchasing history of only one purchaser, the court cannot speculate as to how the Commission viewed the other's purchasing history to support Weirton's representations.

While the court does not question the veracity of the representations in the affidavit, or the weight the Commission chooses to assign it, the reasoning the Commission extracts therefrom is flawed. That a purchaser switched to a foreign source of supply does not necessarily mean it did so for price reasons. Also, simply because a purchaser indicates to a producer the availability of lower priced subject imports does not negate the evidence of Weirton's pricing practices. Weirton's pricing depart-

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[34] *See, e.g.*, [ ] Supply Agreement, C.R. Doc 208, Pl. App. Tab 16 at Exh. 1, which includes a provision whereby [ ]. The Commission does not discuss whether this type of agreement is typical in the TCCSS industry.

[35] Weirton submitted to the Commission its internal "Competitive Price Allowance" sheets for several purchasers during the POI. Weirton lists the following as its "Competition": for [ ] in 1997, 1999 and 2000[ ], but only [ ] in 1998; for [ ] in 1997, 1998, and 2000, [ ], but also [ ] in 1999; for [ ] in 1997[ ], and in 1999[ ]; in for [ ] in 1998, 1999 and 2000[ ], but also [ ] in 1997; and for [ ] in 1999 [ ]. *See* Petitioner's Post-hearing Br. at Exh 2.

[36] The Commission noted only that "[s]pecifically, in 1999 [ ] increased its purchases of Japanese TCCSS by [ ] short tons * * * (while reducing its purchases from domestic suppliers by [ ] short tons)." Final Determination at 17 n.71.

ment apparently derives its pricing allowance range solely according to pricing data of domestic producers submitted by its sales department. There is no evidence that Weirton somehow abandoned its way of calculating the pricing allowances, or that the documents it submitted are somehow inaccurate. Although given the opportunity, Weirton did not provide any evidence that it actually had to bid below the calculated range, or any other evidence that the sales department submitted foreign pricing data to the pricing department. If the ultimate question is whether lower Japanese prices forced domestic producers to lower prices or prevented them from raising prices, the Commission cannot ignore, and must evaluate on remand, evidence showing that the petitioner set its prices within a range established only by domestic prices.

The Commission did rely on four internal negotiating memoranda. Only one of these memoranda indicates that lower-priced Japanese imports were taken into consideration during negotiations with domestic suppliers.[37] The second refers only generally to "foreign suppliers," and the final two discuss only the effect of Weirton's filing of an antidumping petition on the supply of Japanese imports. The Commission may rely on documentary evidence to determine the extent to which subject import pricing factored into domestic supply negotiations. Nevertheless, if the Commission chooses to rely on this type of evidence, it must make an affirmative assessment of the documentary evidence in its entirety, rather than selecting a few documents without explaining why they exemplify industry practice, or why they otherwise should be accorded weight.

c. Lost Sales and Revenue

Lastly, the Commission stated that "the adverse effect of subject imports is also reflected in, among other things, [the fact that] four purchasers confirmed that a particular producer either had been forced to reduce its price to these purchasers because of lower prices by sellers of Japanese TCCSS or had lost a sale outright." Final Determination at 17–18. Evidence of actual lost sales and lost revenues is not required to support a finding that the domestic industry is materially injured by reason of the subject imports. *Companhia Paulista,* 20 CIT at 479–80 (citing *Acciai,* 19 CIT at 1056–57 (noting that Commission not required to rest its decision on lost sales or lost revenues, as these may be only possible signals of impact)). Although evidence of lost sales and revenue may be probative, the lack of such evidence ordinarily will not vitiate a Commission determination. *Stalexport v. United States,* 890 F. Supp. 1053, 1076 (Ct. Int'l Trade 1995); *Metallverken,* 13 CIT at 1025 (citing *USX,* 11 CIT at 86, 655 F. Supp. at 491). This is not to say, however, that where the Commission chooses to rely on findings of lost sales/revenue, it need not support such findings with substantial evidence.

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[37] The relevant text of the memo cited by the Commission is as follows: [ ] [ ] Memo (September 4, 1998), C.R. Doc. 208, Pl. App. at Tab 17. The context of this memo reveals that the writer was discussing sourcing supply in light of labor and performance concerns, and pricing of imports appears incidental. The Commission also omits that in 1999 this purchaser, although purchasing from a Japanese producer for the first time, in fact increased its purchases from Weirton from [ ] tons in 1998 to [ ] tons in 1999.

The Commission fails to indicate the data upon which it relied in making its lost sales/revenue conclusions, or any context which would reveal why these four confirmations were given weight. Presumably, the Commission derived "four confirmations" from the Staff Report.[38] Nippon alleges that the purchaser may have been confused about whether the lost sale had to be to a Japanese supplier. The record shows, however, that the Commission took steps to make sure the purchaser understood the nature of the allegation. *See* Notes (May 12, 2000; June 7, 2000; July 5, 2000) C.R. Docs. 66, 133, 260. Nippon also alleges that one confirmed lost sale was "an impossibility" because the Japanese producers supplied different facilities than the U.S. producer alleging lost sales.[39] Nippon overlooks the fact that each of this purchaser's facilities in fact received bids from Japanese and U.S. producers. "Lost sales allegations refer to the situation in which the domestic industry is unable to make a sale because of the presence of lower priced imports." *Copperweld*, 12 CIT at 169 n.15, 682 F. Supp. at 572 n.15. Thus, it is not "impossible" for this producer to report as a "lost sale" a sale that was ultimately awarded to a Japanese producer.

Nevertheless, the data in the lost sales allegation do not reflect the purchasing history data provided for this particular purchaser.[40] Although the Commission followed up on the lost sales allegation with the purchaser in question, the Commission does not indicate that there was in fact a competing import price for that sale.[41] Furthermore, the absolute number of lost sales is not, by itself, meaningful. Rather, the Commission must indicate in the Final Determination how many allegations were actually made, or at least the volume of the individual confirmed lost sale(s) it relies on, in order to give the court a basis for reviewing why the Commission deemed the lost sale(s) significant. Therefore, on remand, the Commission shall indicate the specific data upon which it

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[38] The Staff Report indicates: "The Commission requested U.S. producers of TCCSS to report any instances of lost sales or revenues they experienced due to competition from imports of TCCSS from Japan since 1997. Of all responding U.S. producers, only [ ] reported specific data of reduced prices, roll-backs of announced price increases, or lost sales to Japan. *See* Staff Report at V–22. Five out of six purchasers disagreed with its lost sales allegations, while one out of four disagreed with its lost revenue allegations." Staff Report at Tables V–14 and V–15.

[39] Nippon claims that the Japanese mills "never supplied the same facilities as [ ] and never competed for [this purchaser's] sales with [ ]." Nippon Br. at 33.

[40] The Staff Report indicates that [ ] alleged that: (1) it lost a sale to [ ] in October of 1998, (2) that the quantity it allegedly lost was [ ] short tons, (3) that its rejected U.S. price was [ ] per short ton, and (4) the accepted import price was [ ], for a total alleged lost sales amount of [ ]. *See* Staff Report at Table V–14. There is no sale to Japanese producers corresponding to a volume of [ ] short tons. The Purchasing History for [ ], however, reveals that [ ] did not bid below [ ] at [ ]. *See id.* at Table V–4a, c. The only bid approximating [ ] was in 1999 when [ ] bid [ ] in 1999, when Japanese producers overbid [ ] at [ ], and were not awarded any volume. *See id.* at Table V–4b. It is thus unclear which sale [ ] lost sale allegation is actually referencing. On remand, the Commission shall specify which lost sale it is referring to in its lost sales discussion, and why that particular lost sale is significant. The Commission should not force the court to engage in guesswork.

[41] *See* Trip Report at 4 ("I did not understand the allegation regarding [ ] where there was no competing import price.")

relied in light of the corresponding purchasing history, and explain why such data are significant.[42]

C. Causation

After assessing the significance of volume, price effects, and impact of the LTFV imports on the domestic industry, "the Commission must take an analytically distinct step to comply with the 'by reason of' standard: the Commission must determine whether these factors as a whole indicate that the LTFV imports themselves made a material contribution to the injury." *Gerald Metals, Inc. v. United States*, 27 F. Supp. 2d 1351, 1356 (Ct. Int'l Trade 1998). In addition, the court in *Taiwan Semiconductor*, 59 F. Supp. 2d at 1329–31, held that "the Commission must not attribute the harmful effects from other sources of injury to the subject imports and must adequately explain how it ensured not doing so." *See also* Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), *reprinted in* Uruguay Round Agreements Act, Legislative History, Vol. VI, at 851–52 (Commission must "ensure that it is not attributing injury from other sources to the subject imports.").

Nippon claims that the majority failed to account adequately for: (1) declining domestic producer reliability; (2) rapid purchaser consolidation; and (3) non-subject imports. Nippon, however, misstates the Commission's obligations with regard to assessing alternative causes of injury. It is not sufficient that the other putative sources of injury had a "demonstrable effect" on the ability of U.S. producers to raise prices. *See* Nippon Br. at 44. The Commission need not find that the alternative causes entirely *negate* the possibility of subject imports' having *any* adverse effect on domestic pricing. Rather, the Commission must determine whether these alternative sources are of such extent and magnitude that they preclude a finding that the subject imports made a *material* contribution to the injury. *Taiwan Semiconductor*, 59 F. Supp. 2d at 1329 ("[I]n some cases, other sources of injury 'may have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor.") (citing *Gerald Metals*, 27 F. Supp. 2d at 1356 n.8).

1. U.S. On-Time Performance and Quality

Nippon does not dispute that the domestic industry's performance deteriorated between 1997 and 1999, in terms of employment, capacity utilization, shipments, and profits. Nippon claims, however, that the Commission's attribution of these effects to subject imports is in error on the ground that the majority ignored evidence that purchasers were forced to requisition increased quantities of imported TCCSS due to de-

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[42] Nippon also asserts that "the majority also cites three unconfirmed lost sales allegations as further evidence of the adverse impact of subject imports." The Commission discounted purchaser testimony disputing the lost sales/revenue allegations with circular reasoning, stating that "the evidence of lost revenue and sales undermined the credibility of purchaser testimony and Respondents' argument that Japanese and domestic suppliers do not compete for the same business." Final Determination at 18 n.72. Nevertheless, Nippon overstates its case, as it is clear that the Commission did not "rely" on unconfirmed sales. The Commission merely noted its concerns about the veracity of the purchasers who disagreed with the lost sales allegations, and did not convert these unconfirmed lost sales into "confirmed" lost sales. Thus, the Commission need not revisit the issue of unconfirmed lost sales allegations, but may choose to do so.

clining domestic producer reliability. In its impact analysis, the Commission acknowledged that there was documentary evidence that showed domestic producers' on-time performance was poor during the POI.[43] The Commission stated, however, that it was "not persuaded by respondents' inconsistent and contradictory testimony that purchasers turned to Japanese sourcing solely because of non-price reasons." Final Determination at 26. The Commission's basis for rejecting all "respondents' testimony"[44] regarding on-time performance was an inconsistency in U.S. Can's testimony:

> U.S. Can claimed that it began shifting more business to Japanese suppliers because of their willingness to supply its increasingly global operations, and the shift accelerated in 1999 due to domestic suppliers' poor performance.[45] * * * Thomas Yurco of U.S. Can testified at the Commission's Preliminary Conference that his company had reduced volume purchased from Weirton because of delivery problems and had switched to other domestic suppliers rather than to imports from Japan or other nonsubject country sources. [No citation.] However U.S. Can's purchasing history shows that in 1999 the company reduced its purchases from domestic producers * * * while it increased its purchases of Japanese TCCSS * * *.[46] Thus, contrary to the statements in the * * * internal memorandum cited above (and contrary to the representations made by Mr. Yurco to Weirton officials), other U.S. producers * * * were not the beneficiaries of Weirton's alleged delivery problems in 1999.[47]

First, the court is unable to assess the Commission's reasoning fully because, in the Staff Report's Table describing U.S. Can's purchasing history, two sets of pricing data are inexplicably given for U.S. Steel, while Weirton is not listed at all. *See* Staff Report at Table V–3. Second, Mr. Yurco specifically testified at the Preliminary Conference that U.S. Can increased its purchases from Japanese suppliers. Preliminary Conf. Tr. at 94, P.R. Doc. 18, Pl. App. at Tab 3. He explained that foreign producers tend to be more globally-oriented, and that it had on-time delivery problems with Weirton, Bethlehem, and Wheeling-Pitt. *Id.* at 95–96. Nowhere in Mr. Yurco's Preliminary Conference testimony does he represent to the Commission that U.S. Can shifted sourcing from Weirton to other domestic producers. His testimony at the Preliminary Conference is therefore consistent with his testimony at the Final-Phase Hear-

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[43] In documents submitted by U.S. Can in response to Chairman Koplan's request, [ ] on-time performance in 1998 was [ ], and in 1999 was [ ], which apparently falls below contractual requirements, thereby triggering price reductions. *See* U.S. Can Questionnaire Response, C.R. Docs. 243–44, Pl. App. at Tab 12 Attachment F–1.

[44] Apparently the Commission considers purchaser testimony to be "respondents' testimony."

[45] The Commission cites to the Preliminary Conf. Tr. at 95 and an internal U.S. Can memo dated February 1, 2000.

[46] The Commission specified that U.S. Can "reduced its purchases from domestic producers by [ ] short tons while it increased its purchases of Japanese TCCSS by approximately [ ] short tons." Final Determination at 26. Total domestic purchases by U.S. Can in 1998 were [ ] short tons compared to [ ] short tons in 1999, a difference of [ ] short tons. U.S. purchases from Japan increased from [ ] short tons in 1998 to [ ] short tons in 1999, a difference of [ ]. The Commission apparently inadvertently included U.S. Can's purchases from Sollac of France in its calculations for Japan, as total foreign purchases in 1998 were [ ] short tons in 1998, compared to [ ] short tons in 1999, a difference of [ ] short tons.

[47] The text of this memo reads as follows: [ ] Pl. App. at Tab 16, Exh. 3.

ing. *See* Hr'g Tr. at 201–08. Apparently, the Commission has conflated U.S. Can's testimony and purchasing history with that of Silgan.[48]

Third, that other U.S. producers may or may not have benefitted from Weirton's alleged delivery problems says nothing about the extent to which U.S. producers as a whole suffered from delivery problems or whether purchasers actually switched for non-price reasons. The Commission does not address either the fact that U.S. Can's communications with Weirton continually reference on-time performance problems, or the specific performance rates provided to the Commission by this purchaser. *See* Post-Hearing Documentation, C.R. Doc. 208, Pl. App. at Tab 16. Nor does it discuss whether Weirton satisfied its performance requirements in its supply agreement with U.S. Can.[49] The Commission may determine that such performance requirements are not in fact industry custom or routinely adhered to, but without any such assessment, the court cannot review adequately its decisions regarding shift in supply. Fourth, the Commission rejects testimony regarding on-time performance problems, but says nothing about the prevalence of problems with quality among domestic TCCSS producers. As its reasons for rejecting purchaser testimony are not well-founded and are otherwise incapable of being reviewed properly by the court, the Commission must assess on remand the evidence regarding domestic performance.[50]

2. Purchaser Consolidation

In the Final Determination, the Commission rejected the Respondents' claim that rapid purchaser consolidation rather than Japanese imports actually caused the general domestic price decline. The Commission based its rejection on the finding that the effect that consolidation among TCCSS purchasers had on domestic prices was "slight" because: (1) "with only seven producers, there is a similar degree of concentration between the major U.S. purchasers and the domestic producers;" (2) the most significant buyer consolidation occurred between 1990 and 1996, during which time consolidation did not "substantially affect prices;" and (3) there had been no significant increase in purchaser consolidation during the POI. Final Determination at 20–21.

The record shows that purchaser concentration increased from 1990 to 1999, although much more rapidly mid-decade than in the latter part

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[48] Mr. Owen of Silgan testified as follows:

[ ]

Hr'g Tr. at 209–10. Silgan's purchasing history supports this testimony: in 1998, it purchased a total of [ ] short tons, which increased to [ ] short tons in 1999, even though it reduced purchases from Weirton ([ ] short tons in 1998 compared to [ ] short tons in 1999), while increasing purchases from [ ]. Japanese purchases went from [ ] short tons in 1998 to [ ] short tons in 1999. Staff Report at Table V–9.

[49] [ ] Letter (January 30, 1998), C.R. Doc. 208, Pl. App. Tab 16 at Exh 9.

[50] To the extent this affects the Commission's price effects analysis, the Commission shall consider these matters in that context as well.

of the decade.[51] During the POI, the top six purchasers maintained roughly three-quarters of the market. In contrast, the number of domestic producers remained at six from 1990 until 1997, when Ohio Castings entered the TCCSS market.[52]

The question underlying the issue of purchaser consolidation in this case is whether the purchasers have increased their leverage to an extent that subject imports could not have been a material cause of the injury. The fact of a similar degree of concentration across purchaser and producer sectors during the POI, or that no significant consolidation took place during the POI, says nothing about whether the relative bargaining power has changed over time to have an effect on price. In some cases, events occurring before the POI may have a *current effect* on the industry dynamics during the POI. Therefore, the Commission's second finding regarding pricing trends during periods of purchaser consolidation is crucial.

The Staff Report indicated that "[a]s a result of [purchaser] consolidations, smaller purchasers have indirect access to discounts that once were reserved for the larger purchasers." Staff Report at V–7.[53] The Commission's review of pricing data from 1990 to 1996 led it to conclude otherwise. Rather than analyze industry-wide pricing data to support its conclusion that domestic pricing remained relatively unaffected by the rapid purchaser consolidation from 1990 to 1996, the Commission relied on Weirton data showing that its weighted average price remained within a "narrow range" during this period.[54] It is within the Commission's discretion to draw conclusions about an industry from the pricing trends of a particular producer occupying a substantial portion of the market. The record reveals that Weirton itself, however, viewed purchaser consolidation during the entire decade as having an effect on its bargaining power and pricing. In a Weirton Steel Mill Visit Report, ITC officials state that Weirton represented that "Weirton purchaser base went from approximately 80 in 1989 to approximately 6 [in 2000]. The result was a *greatly diminished power to negotiate and a decrease in price.*" *Memorandum from Christopher Cassie and Sandra Rivera to File* (May 22, 2000), at 5, C.R. Doc. 67, Pl. App. at Tab 22 (staff

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[51] The Commission relied on purchaser concentration data provided by Weirton that showed the top 6 purchasers represented approximately 30 percent of the market in 1990; 30 percent in 1991; 35 percent in 1992; 42 percent in 1993; 45 percent in 1994; 56 percent in 1995; 71 percent in 1996; 76 percent in 1997; 78 percent in 1998; and 75 percent in 1999. *See* Petitioner's Post-Hearing Br., Exh. 13. Thus, the record supports the Commission's finding that the most significant purchaser consolidation occurred between 1990 and 1996, and justifies its focus on measures of price stability during this period.

[52] Nippon does not claim that the entry of Ohio Castings into the TCCSS market accounted for the price decline of the domestic industry during the POI, as Commissioner Askey maintained in her dissent. *See* Commissioner Askey Dissent at 23.

[53] The Staff Report specified that:

> One purchaser, [ ], noted that the price growth rate has fallen. Prices increased by 5 percent in 1994, increased 2.75 percent in 1997, then increased 3.75 percent in 2000. [ ]

Id. The Staff Report did not discuss whether there was a relationship, either direct or inverse, between purchaser consolidation and industry-wide pricing trends from 1990 to 1999.

[54] Weirton's weighted average prices were approximately as follows: [ ] Weirton's Post-Hearing Br. at Exh. 13. The Commission does not explain the apparent inconsistency in deeming this a "narrow range" of pricing, when in its price sensitivity argument it maintains that a small fraction of a discount rate would induce a purchaser to switch suppliers. Nevertheless, price stability over time is not necessarily dictated by purchasers' criteria in decision-making.

notes) (emphasis added). The Commission did not state that the ITC investigators' findings were incorrect.

Nevertheless, the court finds no error here. The Commission's interpretation of the data it receives is not limited by the interpretation of the party providing them. Nippon has not pointed to evidence that industry-wide pricing trends from 1990 to 1996 are inconsistent with Weirton's submitted pricing data for this period. Nor has Nippon asserted that Weirton's pricing actually declined over this period. For the purpose of discounting purchaser consolidation as having a "predominant effect" in producing injury, it is sufficient in this case, where there is minimal evidence to the contrary, for the Commission to rely on evidence that prices for a substantial segment of the industry remained relatively stable over time in the face of rapidly increasing purchaser concentration.

3. Non-Subject Imports

The Commission rejected the contention that non-subject imports accounted for the decline in domestic pricing based on its finding that "[a]lthough non-subject imports were a significant factor in the domestic market during the period of investigation, subject imports [1] grew more rapidly and [2] were generally priced more aggressively." Final Determination at 22. Nippon argues that non-subject import volume would have had a significantly larger competitive impact than subject import volume because the majority of domestic shipments were in the Eastern United States, in direct competition with all non-subject competition. Nippon also argues that the "ITC staff's own comparison of subject and non-subject prices demonstrates that subject imports largely oversold non-subject imports." Reply Br. at 14.

a. Non-Subject Import Volume

With respect to non-subject import volume, the Commission discounted non-subject imports as an alternative source of injury on the ground that subject imports' market share was "comparable" to the non-subject imports' market share where "[b]y 1999, the volume of imports from Japan alone nearly equaled the volume of imports from all other sources combined." Final Determination at 22. The Commission in describing "conditions of competition" had noted that "while non-subject imports accounted for a somewhat greater proportion of total U.S. market share than subject imports during most of the period of investigation,[55] subject imports' total market share increased at a substantially greater rate than non-subject imports." Final Determination at 11. As stated in the discussion above regarding volume, Japanese imports account for at least some of the decrease in market share held by the domestic industry. Although this may be sufficient for the purpose of finding subject import volume "significant," the Commission must still address whether non-subject imports constitute a predominant source

[55] The record shows that the market share of non-subject imports was greater than that of subject imports at all times during the POI except the first quarter of 2000. *See* Staff Report at Table IV-5.

of injury in light of conditions of competition. *See Taiwan Semiconductor,* 59 F. Supp. 2d at 1329. The Commission acknowledged in its conditions of competition discussion that nonsubject imports were not sold in the West, yet does not analyze this condition in response to Respondents' alternative source of injury claim. Even if subject and non-subject market share levels are "comparable" on the whole, non-subject imports are not necessarily precluded from constituting the predominant source of injury where, as in this case, they are concentrated in regions to which most domestic shipments were made. That Japanese import volume grew at a higher rate of increase does not relieve the Commission from assessing characteristics of the industry that may or may not show a correlation between non-subject imports and injury to the domestic industry.

b. Non-Subject Import Pricing

With respect to non-subject import pricing, the Commission specified that "high-quality subject imports frequently undersold high quality non-subject imports and even undersold lesser quality non-subjects as well." Final Determination at 22. For support of this conclusion, the Commission cites to all of the pricing tables—i.e., "Tables V–1 through V–13"—and instructs the reader to "compare" all of these tables with Table II–6. The Commission then indicated that:

> A summary of these data indicates that TCCSS from Canada, Germany, and the Netherlands (countries that, like Japan, are sources of high quality TCCSS) were priced higher than TCCSS from Japan in five of seven comparisons. In 1997–1998, imports from Japan generally oversold imports from other non-subject countries (those whose principal sales advantages are favorable prices and/or discounts), but in 1999–2000, imports from Japan matched or undersold imports from these countries in half of the comparisons.

Final Determination at 22–23 n.84 (citing Staff Notes, Requested by Commissioner Okun's staff (January 30, 2001, revised July 31, 2001) ["Staff Notes"], *see* Pl. App. at Tab 24). The Staff Notes memo indicates that the latter group is comprised of China, France, Brazil, Korea, Mexico, Norway, Belgium, and Taiwan, but does not explain whether the countries were grouped according to quality or volume[56]

First, the Commission does not make clear why it chose to distinguish between "countries that are sources of high-quality TCCSS" and "those whose principal sales advantages are favorable prices and/or discounts," or its basis for grouping the countries in the way that it did. The Commission does not cite to anything that would enable the court to review the reasons for this choice. Nor does the Commission explain the apparent inconsistency in its grouping in this manner with that described in purchaser testimony and the Staff Report. Mr. Owen of Silgan testified as follows: "If we did choose to purchase on the basis of price, Silgan

[56] It appears that this manner of grouping parallels that found in Weirton's Post-hearing Br. There, Weirton grouped the countries in this manner based on the fact that Canada, Germany and the Netherlands are the only three countries (besides Japan) whose exports to the United States exceeded 50,000 tons in 1999.

would pursue imports from Brazil, Korea, or Taiwan or other countries that aggressively solicit orders from us at prices well below any that we see from the U.S., Japan, Europe or Canada." Hr'g Tr. at 213. The Staff Report indicates that "Questionnaire respondents reported that TCCSS produced in the United States, Japan, and in non-subject countries are generally interchangeable in most uses. With the exception of some specialty orders for which specifications cannot be met by U.S. producers, the products are relatively close substitutes regarding physical characteristics." Staff Report at II–6. Naturally, dividing non-subject countries into ones that charge high prices with those who charge low prices will likely cause the Commission to find a higher incidence of underselling of the former group than of the latter.[57] As there is no apparent reasonable and consistent basis for grouping the countries as it did, the Commission on remand shall reassess non-subject underselling.

Second, the Commission neglected to compile the pricing data in any meaningful, consistent way to enable the court to follow its reasoning process. It is insufficient for the Commission simply to cite to all the tables of raw pricing data submitted by the purchasers, and force the court to attempt to reconstruct its analysis. Table II–6 compares quality assessments of purchasers of U.S. product with non-subject product. That U.S. prices were generally superior to non-subject prices, and superior to Japanese prices, says nothing about whether non-subject prices were or were not superior to Japanese prices. Where the Commission has access to data that would enable it to construct a table comparing Japanese prices directly to non-subject prices, in either aggregated or disaggregated form, it should do so (as it now must on remand), rather than leaving the parties and the court to figure out how it arrived at its conclusion.

CONCLUSION

Even though the court finds no error in the Commission's volume analysis, the price effects analysis is unsupported and the causation analysis is flawed in at least two respects. The court expresses no opinion on the result, but the Commission must provide a more complete analysis for whatever decision is reached. Accordingly, the court remands the Commission's Final Determination. With respect to price effects, the Commission on remand shall, in light of the concerns detailed herein: (1) reconsider underselling taking into account inconsistencies in the manner in which the data were presented; (2) explain its methodology for making price comparisons for underselling; (3) indicate the basis for calculating the yearly average margin of underselling and for concluding that such margins are significant; (4) reassess its conclusions with respect to a correlation between subject import competition and domestic prices; (5) reevaluate its price sensitivity finding in light of

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[57] The court notes that the Commission's statement that subject imports "even undersold lesser-quality non-subject imports" is possibly misleading because, by omitting percentage incidence of underselling, it implies that there was generally underselling of imports from these countries. In fact, there was only one instance of underselling of non-subject imports by Japanese imports, out of a total of 15 comparisons. *See* Staff Note at Table 4.

evidence in the record; and (6) indicate the data and context upon which it bases its findings regarding lost sales. The Commission shall also reassess causation taking into consideration the role of non-price factors in purchasing decisions and non-subject imports.

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